REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

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VOLUME XXI

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FOREWORD

The present volume is made up of three arbitration cases, namely, the case concerning boundary disputes between India and Pakistan relating to the interpretation of the report of the Bengal Boundary Commission, 12 and 13 August 1947, the case concerning a dispute between Argentina and Chile concerning the Beagle Channel and the case concerning the delimitation of maritime areas between Canada and France.

In accordance with the practice followed in this series, awards in English or French are published in the original language. Those in both languages are published in one of the original languages. Awards in other languages are published in English. A footnote indicates when the text reproduced is a translation made by the Secretariat of the United Nations.

This volume, like volumes IV to XX, was prepared by the Codification Division of the Office of Legal Affairs.

AVANT-PROPOS

Le présent volume réunit trois affaires soumises à l'arbitrage : l'affaire des litiges frontaliers entre l'Inde et le Pakistan, portant sur l'interprétation du rapport de la Commission chargée de délimiter les frontières du Bengale, en date des 12 et 13 août 1947, l'affaire du litige entre la République argentine et la République du Chili relatif au canal de Beagle et l'affaire concernant la délimitation de zones maritimes entre le Canada et la France.

Conformément à la pratique, le présent *Recueil* reproduit les sentences rendues en anglais ou en français dans la langue originale et celles qui ont été rendues en anglais et en français dans l'une des deux langues originales. Il fournit une version anglaise des sentences rendues dans d'autres langues en spécifiant, le cas échéant, dans une note de bas de page si la traduction émane du Secrétariat de l'Organisation des Nations Unies.

Le présent volume, comme les volumes IV à XX, a été établi par la Division de la Codification du Bureau des affaires juridiques de l'Organisation des Nations Unies.

PART I

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I

By the Indian Independence Act, 1947, as from August 15th, 1947, two independent Dominions were set up in India, to be known respectively as India and Pakistan. According to Section 2 (2), it was provided that the territories of Pakistan should be *inter alia* the territories which, on the appointed day, were included in the Province of East Bengal, as constituted under Section 3. It was laid down in this section that the Province of Bengal, as constituted under the Government of India Act 1935, should cease to exist and that there should be constituted in lieu thereof two new Provinces, to be known respectively as East Bengal and West Bengal. The boundaries of the New Province of East Bengal should be such as may be determined, whether before or after the appointed day, by the award of a boundary commission appointed or to be appointed by the Governor General in that behalf, and the expression "award" should mean, in relation to boundary commission, the deci-

sions of the Chairman of that commission contained in his report to the Governor General at the conclusion of the commission's proceedings.

The Commission, known as the Bengal Boundary Commission, was constituted by the Governor General on June 30th, 1947. The Commission presented to the Governor General the following two reports dated the 12th and 13th August, 1947, respectively:

REPORT OF THE BENGAL BOUNDARY COMMISSION

To

His Excellency the Governor General.

1. I have the honour to present the decision and award of the Bengal Boundary Commission, which, by virtue of section 3 of the Indian Independence Act, 1947, is represented by my decision as Chairman of that Commission. This award relates to the division of the Province of Bengal, and the Commission's award in respect of the District of Sylhet and areas adjoining thereto will be recorded in a separate report.

2. The Bengal Boundary Commission was constituted by the announcement of the Governor General, dated the 30th of June, 1947, Reference No. D50/7/47R. The members of the Commission thereby appointed were

Mr. Justice Bijan Kumar Mukherjea,

Mr. Justice C. C. Biswas,

Mr. Justice Abu Saleh Mohamed Akram, and

Mr. Justice S. A. Rahman.

I was subsequently appointed Chairman of this Commission.

3. The terms of reference of the Commission, as set out in the announcement were as follows: —

> "The Boundary Commission is instructed to demarcate the boundaries of the two parts of Bengal on the basis of ascertaining the contiguous areas of Muslims and non-Muslims. In doing so, it will also take into account other factors."

We were desired to arrive at a decision as soon as possible before the 15th of August.

4. After preliminary meetings, the Commission invited the submission of memoranda and representations by interested parties. A very large number of memoranda and representations was received.

5. The public sittings of the Commission took place at Calcutta, and extended from Wednesday the 16th of July 1947, to Thursday the 24th of July 1947, inclusive, with the exception of Sunday the 20th of July. Arguments were presented to the Commission by numerous parties on both sides, but the main cases were presented by counsel on behalf of the Indian National Congress, the Bengal Provincial Hindu Mahasabha and the New Bengal Association on the one hand, and on behalf of the Muslim League on the other. In view of the fact that I was acting also as Chairman of the Punjab Boundary Commission, whose proceedings were taking place simultaneously with the proceedings of the Bengal Boundary Commission. I did not attend the public sittings in person, but made arrangements to study daily the record of the proceedings and all material submitted for our consideration.

6. After the close of the public sittings, the remainder of the time of the Commission was devoted to clarification and discussion of the issues involved. Our discussions took place at Calcutta.

7. The question of drawing a satisfactory boundary line under our terms of reference between East and West Bengal was one to which the parties concerned propounded

the most diverse solutions. The province offers few, if any, satisfactory natural boundaries, and its development has been on lines that do not well accord with a division by contiguous majority areas of Muslim and non-Muslim majorities.

8. In my view, the demarcation of a boundary line between East and West Bengal depended on the answers to be given to certain basic questions which may be stated as follows: —

(1) To which State was the City of Calcutta to be assigned, or was it possible to adopt any method of dividing the City between the two States?

(2) If the City of Calcutta must be assigned as a whole to one or other of the States, what were its indispensable claims to the control of territory, such as all or part of the Nadia River system or the Kulti rivers, upon which the life of Calcutta as a city and port depended?

(3) Could the attractions of the Ganges-Padma-Madhumati river line displace the strong claims of the heavy concentration of Muslim majorities in the districts of Jessore and Nadia without doing too great a violence to the principle of our terms of reference?

(4) Could the district of Khulna usefully be held by a State different from that which held the district of Jessore?

(5) Was it right to assign to Eastern Bengal the considerable block of non-Muslim majorities in the districts of Malda and Dinajpur?

(6) Which State's claim ought to prevail in respect of the Districts of Darjeeling and Jalpaiguri, in which the Muslim population amounted to 2.42 per cent. of the whole in the case of Darjeeling, and to 23.08 per cent. of the whole in the case of Jalpaiguri, but which constituted an area not in any natural sense contiguous to another non-Muslim area of Bengal?

(7) To which State should the Chittagong Hill Tracts be assigned, an area in which the Muslim population was only 3 per cent. of the whole, but which it was difficult to assign to a State different from that which controlled the district of Chittagong itself?

9. After much discussion, my colleagues found that they were unable to arrive at an agreed view on any of these major issues. There were of course considerable areas of the Province in the south-west and north-east and east, which provoked no controversy on either side; but, in the absence of any reconciliation on all main questions affecting the drawing of the boundary itself, my colleagues assented to the view at the close of our discussions that I had no alternative but to proceed to give my own decision.

10. This I now proceed to do: but I should like at the same time to express my gratitude to my colleagues for their indispensable assistance in clarifying and discussing the difficult questions involved. The demarcation of the boundary line is described in detail in the schedule which forms Annexure A to this award, and in the map attached thereto, Annexure B. The map is annexed for purposes of illustration, and if there should be any divergence between the boundary as described in Annexure A and as delineated on the map in Annexure B, the description in Annexure A is to prevail.

11. I have done what I can in drawing the line to eliminate any avoidable cutting of railway communications and of river systems, which are of importance to the life of the province: but it is quite impossible to draw a boundary under our terms of reference without causing some interruption of this sort, and I can only express the hope that arrangements can be made and maintained between the two States that will minimize the consequences of this interruption as far as possible.

NEW DELHI;
The 12th August, 1947.

Cyril RADCLIFFE

The schedule
(*See* Annexures A and B)

ANNEXURE A

1. A line shall be drawn along the boundary between the Thana of Phansidewa in the District of Darjeeling and the Thana Tetulia in the District of Jalpaiguri from the point where that boundary meets the Province of Bihar and then along the boundary between the Thanas of Tetulia and Rajganj; the Thanas of Pachagar and Rajganj, and the Thanas of Pachagar and Jalpaiguri, and shall then continue along the northern corner of the Thana Debiganj to the boundary of the State of Cooch-Behar. The District of Darjeeling and so much of the District of Jalpaiguri as lies north of this line shall belong to West Bengal, but the Thana of Patgram and any other portion of Jalpaiguri District which lies to the east or south shall belong to East Bengal.

2. A line shall then be drawn from the point where the boundary between the Thanas of Haripur and Raiganj in the District of Dinajpur meets the border of the Province of Bihar to the point where the boundary between the Districts of 24 Parganas and Khulna meets the Bay of Bengal. This line shall follow the course indicated in the following paragraphs. So much of the Province of Bengal as lies to the west of it shall belong to West Bengal. Subject to what has been provided in paragraph 1 above with regard to the Districts of Darjeeling and Jalpaiguri, the remainder of the Province of Bengal shall belong to East Bengal.

3. The line shall run along the boundary between the following Thanas:

Haripur and Raiganj; Haripur and Hemtabad; Ranisankail and Hemtabad; Pirganj and Hemtabad; Pirganj and Kaliganj; Bochaganj and Kaliganj; Biral and Kaliganj; Biral and Kushmundi; Biral and Gangarampur; Dinajpur and Gangarampur; Dinajpur and Kumarganj; Chirirbandar and Kumarganj; Phulbari and Kumarganj; Phulbari and Balurghat. It shall terminate at the point where the boundary between Phulbari and Balurghat meets the north-south line of the Bengal-Assam Railway in the eastern corner of the Thana of Balurghat. The line shall turn down the western edge of the railway lands belonging to that railway and follow that edge until it meets the boundary between the Thanas of Balurghat and Panchbibi.

4. From that point the line shall run along the boundary between the following Thanas:

Balurghat and Panchbibi; Balurghat and Joypurhat; Balurghat and Dhamairhat; Tapan and Dhamairhat; Tapan and Pathnitala; Tapan and Porsha; Bamangola and Porsha; Habibpur and Porsha; Habibpur and Gomastapur; Habibpur and Bholahat; Malda and Bholahat; English Bazar and Bholahat; English Bazar and Shibganj; Kaliachak and Shibganj; to the point where the boundary between the two last mentioned thanas meets the boundary between the districts of Malda and Murshidabad on the river Ganges.

5. The line shall then turn south-east down the River Ganges along the boundary between the Districts of Malda and Murshidabad; Rajshahi and Murshidabad; Rajshahi and Nadia; to the point in the north-western corner of the District of Nadia where the channel of the River Mathabhanga takes off from the River Ganges. The District boundaries, and not the actual course of the River Ganges, shall constitute the boundary between East and West Bengal.

6. From the point on the River Ganges where the channel of the river Mathabhanga takes off the line shall run along that channel to the northernmost point where it meets the boundary between the Thanas of Daulatpur and Karimpur. The middle line of the main channel shall constitute the actual boundary.

7. From this point the boundary between East and West Bengal shall run along the boundaries between the Thanas of Daulatpur and Karimpur; Gangani and Karimpur; Meherpur and Karimpur; Meherpur and Tehatta; Meherpur and Chapra; Damurhuda and

Chapra; Damurhuda and Krishnaganj; Chuadanga and Krishnaganj; Jibannagar and Krishnaganj; Jibannagar and Hanskhali; Meheshpur and Hanskhali; Meheshpur and Ranaghat; Meheshpur and Bongaon; Jhikargacha and Bongaon; Sarsa and Bongaon; Sarsa and Gaighata; Gaighata and Kalarao; to the point where the boundary between those thanas meets the boundary between the districts of Khulna and 24 Parganas.

8. The line shall then run southwards along the boundary between the Districts of Khulna and 24 Parganas, to the point where that boundary meets the Bay of Bengal.

REPORT OF THE BENGAL BOUNDARY COMMISSION
(SYLHET DISTRICT)

To

His Excellency the Governor General.

1. I have the honour to present the report of the Bengal Boundary Commission relating to Sylhet District and the adjoining districts of Assam. By virtue of Section 3 of the Indian Independence Act, 1947, the decisions contained in this report become the decision and award of the Commission.

2. The Bengal Boundary Commission was constituted as stated in my report dated the 12th of August, 1947, with regard to the division of the Province of Bengal into East and West Bengal. Our terms of reference were as follows: —

> "The Boundary Commission is instructed to demarcate the boundaries of the two parts of Bengal on the basis of ascertaining the contiguous majority areas of Muslims and non-Muslims. In doing so, it will also take into account other factors.
>
> "In the event of the referendum in the District of Sylhet resulting in favour of amalgamation with Eastern Bengal, the Boundary Commission will also demarcate the Muslim majority areas of Sylhet District and the contiguous Muslim majority areas of the adjoining districts of Assam."

3. After the conclusion of the proceedings relating to Bengal, the Commission invited the submission of memoranda and representations by parties interested in the Sylhet question. A number of such memoranda and representations was received.

4. The Commission held open sittings at Calcutta on the 4th, 5th and 6th days of August 1947, for the purpose of the hearing arguments. The main arguments were conducted on the one side by counsel on behalf of the Government of East Bengal and the Provincial and District Muslim Leagues; and on the other side, by counsel on behalf of the Government of the Province of Assam and the Assam Provincial Congress Committee and the Assam Provincial Hindu Mahasabha. I was not present in person at the open sittings as I was at the time engaged in the proceedings of the Punjab Boundary Commission which were taking place simultaneously, but I was supplied with the daily record of the Sylhet proceedings and with all material submitted for the commission's consideration. At the close of the open sittings, the members of the Commission entered into discussions with me as to the issues involved and the decisions to be come to. These discussions took place at New Delhi.

5. There was an initial difference of opinion as to the scope of the reference entrusted to the Commission. Two of my colleagues took the view that the Commission had been given authority to detach from Assam and to attach to East Bengal any Muslim majority areas of any part of Assam that could be described as contiguous to East Bengal, since they construed the words "the adjoining districts of Assam" as meaning any districts of Assam that adjoined East Bengal. The other two of my colleagues took the view that the Commission's power of detaching areas from Assam and transferring them to East Bengal was limited to the District of Sylhet and contiguous Muslim majority areas (if any) of other districts of Assam that adjoined Sylhet. The difference of opinion was referred to me for my casting vote, and I took the view that the more limited construction of our

terms of reference was the correct one and that the "adjoining districts of Assam" did not extend to other districts of Assam than those that adjoined Sylhet. The Commission accordingly proceeded with its work on this basis.

6. It was argued before the Commission on behalf of the Government of East Bengal that on the true construction of our terms of reference and section 3 of the Indian Independence Act, 1947, the whole of the District of Sylhet at least must be transferred to East Bengal and the Commission had no option but to act upon this assumption. All my colleagues agreed in rejecting this argument, and I concur in their view.

7. We found some difficulty in making up our minds whether, under our terms of reference, we were to approach the Sylhet question in the same way as the question of partitioning Bengal, since there were some differences in the language employed. But all my colleagues came to the conclusion that we were intended to divide the Sylhet and adjoining districts of Assam between East Bengal and the Province of Assam on the basis of contiguous majority areas of Muslims and non-Muslims, but taking into account other factors, I am glad to adopt this view.

8. The members of the Commission were however unable to arrive at an agreed view as to how the boundary lines should be drawn, and after discussion of their differences, they invited me to give my decision. This I now proceed to do.

9. In my view, the question is limited to the districts of Sylhet and Cachar, since of the other districts of Assam that can be said to adjoin Sylhet neither the Garo Hills nor the Khasi and Jaintia Hills nor the Lushai Hills have anything approaching a Muslim majority of population in respect of which a claim could be made.

10. Out of 35 thanas in Sylhet, 8 have non-Muslim majorities; but on these eight, two—Sulla and Ajmiriganj (which is in any event divided almost evenly between Muslims and non-Muslims), are entirely surrounded by preponderatingly Muslim areas, and must therefore go with them to East Bengal. The other six thanas comprising a population of over 5,30,000 people stretch in a continuous line along part of the southern border of Sylhet District. They are divided between two sub-divisions, of which, one, South Sylhet, comprising a population of over 5,15,000 people, has in fact a non-Muslim majority of some 40,000; while the other, Karimganj, with a population of over 5,68,000 people, has a Muslim majority that is a little larger.

11. With regard to the District of Cachar, one thana, Hailakandi, has a Muslim majority and is contiguous to the Muslim thanas of Badarpur and Karimganj in the District of Sylhet. This thana forms, with the thana of Katlichara immediately to its south, the sub-division of Hailakandi; and in the sub-division as a whole Muslims enjoy a very small majority being 51 per cent. of the total population. I think that the dependence of Katlichara on Hailakandi for normal communications makes it important that the area should be under one jurisdiction, and that the Muslims would have at any rate a strong presumptive claim for the transfer of the Sub-division of Hailakandi, comprising a population of 1,66,536, from the Province of Assam to the Province of East Bengal.

12. But a study of the map shows, in my judgment, that a division on these lines would present problems of administration that might gravely affect the future welfare and happiness of the whole District, not only would the six non-Muslim thanas of Sylhet be completely divorced from the rest of Assam if the Muslim claim to Hailakandi were recognised; but they form a strip running east and west whereas the natural division of the land is north and south and they effect an awkward severance of the railway line through Sylhet, so that, for instance, the junction for the town of Sylhet itself, the capital of the district, would lie in Assam, not in East Bengal.

13. In those circumstances I think that some exchange of territories must be effected if a workable division is to result. Some of the non-Muslim thanas must go to East Bengal and some Muslim territory and Hailakandi must be retained by Assam. Accordingly I decide and award as follows: —

A line shall be drawn from the point where the boundary between the Thanas of Patharkandi and Kulaura meets the frontier of Tripura State and shall run north along the boundary between those Thanas, then along the boundary between the Thanas of Patharkandi and Barlekha, then along the boundary between the Thanas of Karimganj and Barlekha, and then along the boundary between the Thanas of Karimganj and Beani Bazar to the point where that boundary meets the River Kusiyara. The line shall then turn to the east taking the River Kusiyara as the boundary and run to the point where that river meets the boundary between the Districts of Sylhet and Cachar. The centre line of the main stream or channel shall constitute the boundary. So much of the District of Sylhet as lies to the west and north of this line shall be detached from the Province of Assam and transferred to the Province of East Bengal. No other part of the Province of Assam shall be transferred.

14. For purposes of illustration a map* marked A is attached on which the line is delineated. In the event of any divergence between the line as delineated on the map and as described in paragraph 13, the written description is to prevail.

NEW DELHI;
The 13th August, 1947.

Cyril RADCLIFFE

Certain disputes arose out of the interpretation of this report, generally known as the Radcliffe Award.

By special agreement concluded on December 14th, 1948, at the Inter-Dominion Conference held at New Delhi the two Dominions agreed as follows for the settlement of these Disputes: —

(1) A tribunal should bet set up at as early a date as possible and not later than January 31st, 1949, for the adjudication and final settlement of the following boundary disputes arising out of the interpretation of the Radcliffe Award and for demarcating the boundary accordingly: —

(A) East-West Bengal disputes concerning—

(i) the boundary between the district of Murshidabad (West Bengal) and the district of Rajshahi including the thanas of Nawabganj and Shibganj of pre-partition Malda district (East Bengal); and

(ii) that portion of the common boundary between the two Dominions which lies between the point on the River Ganges where the channel of the River Mathabhanga takes off according to Sir Cyril Radcliffe's award and the northernmost point where the channel meets the boundary between the thanas of Daulatpur and Karimpur according to that Award.

(B) East Bengal–Assam disputes concerning—

(i) the Patharia Hill Reserve Forest; and

(ii) the course of the Kusiyara River.

(2) The Tribunal shall consist of three members as follows: —

One member nominated by each of the two Dominions of India and Pakistan, such person being one who is holding or has held high judicial office and a Chairman who is holding or has held high judicial office and is acceptable to both Dominions. In the event of disagreement between the members, the decision of the Chairman shall be final in all matters. The Tribunal shall report within three months from the date of its first sitting.

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* Not attached.

(3) After the Tribunal has adjudicated upon the disputes, the boundaries shall be demarcated jointly by the experts of both Dominions. If there is any disagreement between the experts regarding the actual demarcation of the boundary *in situ*, such disagreement shall be referred to the Tribunal for decision and the boundary shall be demarcated finally in accordance with such decision.

(4) The Tribunal shall prescribe the procedure to be followed for adjudicating upon the disputes as well as for deciding the point or points of disagreement, if any arising from the demarcation of boundary.

According to the agreement the cost of the Tribunal and of implementing the agreement contained in paragraphs (1), (2) and (3) above other than that of the staff normally employed by the two Governments should be borne equally by both Dominions.

II

Pursuant to section (2) of the said Agreement the Governments of the two Dominions nominated as members of the Tribunal, the Government of India The Hon'ble Chandrasekhara Aiyar, retired judge of the Madras High Court, and the Government of Pakistan the Hon'ble M. Shahabuddin, judge of the High Court at Dacca in East Bengal. The two High Contracting Parties nominated as Chairman The Hon'ble Algot Bagge, former member of the Supreme Court of Sweden.

By Special agreements in November 1949, between the Government of the two Dominions it was settled that the Tribunal thus composed should be deemed to have been set up in terms of the Delhi agreement of December 14th, 1948, that the Tribunal should open its proceedings at Calcutta and that it should sit part of the time at Calcutta and part of the time at Dacca, the Headquarters of the Tribunal being wherever it is sitting for the time being. It was also agreed that the sittings at Calcutta and Dacca should be for approximately equal periods. All arrangements for the sittings at Calcutta should be made by the Government of India and those for the sitting at Dacca by the Government of Pakistan.

On December 3rd, 1949, the Tribunal held an informal meeting in the Great Eastern Hotel at Calcutta and, acting pursuant to the provisions of the Inter-Dominion Agreement of 1948, established the necessary rules for the procedure. It was decided—

(i) that the Tribunal would be known as "The Indo-Pakistan Boundary Disputes Tribunal";

(ii) that the hearings concerning East-West Bengal disputes should take place at Calcutta and the hearings concerning East Bengal-Assam disputes should take place at Dacca;

(iii) that the hearings should be open to public, the Tribunal reserving to themselves the right to make exceptions to this rule;

(iv) that the Tribunal should hear oral arguments by Counsel of each Party, in the dispute concerning the boundary between the district of Murshidabad and the district of Rajshahi, the

Indian Government beginning and the Pakistan Government replying; in the dispute concerning the River Mathabhanga the Pakistan Government beginning and the Indian Government replying; in the dispute concerning the Patharia Hill Reserve Forest, the Indian Government beginning and the Pakistan Government replying and in the dispute concerning the course of the River Kusiyara, the Pakistan Government beginning and the Indian Government replying;

(v) that the procedure should be informal; and

(vi) that the proceedings should be recorded by the Secretary-General appointed by the Tribunal, a full shorthand report being also made.

The tribunal appointed as Secretary-General to the Tribunal the Hon'ble G. de Sydow, judge of the Court of Appeal at Stockholm.

The hearing took place in the West Bengal Legislative Assembly Buildings at Calcutta from December 5th until December 16th, 1949, and in the Legislative Building at Dacca from January 4th until January 12th 1950. The Government of the Dominion of India was represented by Sri S. M. Bose, Advocate-General, West Bengal, Bar-at-Law, assisted by Messrs. M. N. Ghosh, Bar-at-Law, M. M. Sen, Bar-at-Law, K. Bagchi, Advocate and K. K. Sen, Pleader. The Government of the Dominion of Pakistan was represented in Calcutta by Mr. W. W. K. Page, K.C., Bar-at-Law, assisted by Messrs. Fayyaz Ali, Advocate General, East Bengal, and Meshbahuddin, Advocate, and in Dacca by Mr. Fayyaz Ali, assisted by Messrs. Mansur Alam, Advocate, and Meshbahuddin, Advocate.

Oral arguments were presented on behalf of the Government of India by Sri S. M. Bose and on behalf of the Government of Pakistan by Messrs. Page and Ali.

An official report of the oral proceedings was prepared by the Secretary-General to the Tribunal. Also a complete shorthand report of the hearings was made under the supervision of the Tribunal and the Parties. When closing the hearings on January 12th 1950, the Chairman stated that the decisions of the Tribunal would be delivered to the two Governments in writing within about one month's time from that date.

III

The tribunal having carefully considered the cases, oral arguments, documents and maps presented by either side and finding a local inspection in Dispute II unnecessary, makes the following decisions:

DISPUTE I

The dispute concerns the boundary between the district of Murshidabad (West Bengal) and the district of Rajshahi including the

thanas of Nawabganj and Shibganj of pre-partition Malda district (East Bengal).

Mr. Justice Chandrasekhara Aiyar opines as follows: —

(See Appendix I.)

The conclusion of Mr. Justice Chandrasekhara Aiyar is as follows: —

The district boundary on the date of the Award must be ascertained and demarcated. If this is impossible, the midstream line of the river Ganges and the land boundary will be demarcated within one year from the date of the publication of this Award.

Mr. Justice Shahabuddin opines as follows: —

(See Appendix II.)

The conclusion of Mr. Justice Shahabuddin is as follows: —

The construction put by Pakistan on the Award in connection with this dispute is correct and reasonable and the boundary in this area, except over the Rampur-Boalia Char is flexible and not rigid and the boundary line shall run along the course described in the Pakistan statement of the case, subject only to such geographical variations as may result from changes occurring in the course of the river Ganges.

The Chairman opines as follows: —

(See Appendix III.)

The conclusion of the Chairman is as follows: —

In the area in dispute the district boundary line, consisting of the land boundary portion of the district boundary as shown on the map Annexure "B" and as described in the Notification No. 10413-Jur., of 11-11-40, and the boundary following the course of the midstream of the main channel of the river Ganges as it was at the time of the Award given by Sir Cyril Radcliffe in his Report of August 12th, 1947, is the boundary between India and Pakistan to be demarcated on the site.

If the demarcation of this line is found to be impossible, the boundary between India and Pakistan in this area shall then be a line consisting of the land portion of the above mentioned boundary and of the boundary following the course of the midstream of the main channel of the river Ganges as determined on the date of demarcation and not as it was on the date of the Award. The demarcation of this line shall be made as soon as possible and at the latest within one year from the date of the publication of this decision.

Having regard to the fact that the two Members have disagreed in their views and that the Chairman has agreed with Mr. Justice Chandrasekhara Aiyar, and giving effect therefore to the terms of section (2) of the Delhi Agreement under which the view of the Chairman has to prevail, the Tribunal gives the following: —

Decision

In the area in dispute the district boundary line, consisting of the land boundary portion of the district boundary as shown on the map Annexure "B" and as described in the Notification No. 10413-Jur., of 11-11-40, and the boundary following the course of the midstream of the main channel of the river Ganges as it was at the time of the Award given by Sir Cyril Radcliffe in his Report of August 12th, 1947, is the boundary between India and Pakistan to be demarcated on the site.

If the demarcation of this line is found to be impossible, the boundary between India and Pakistan in this area shall then be a line consisting of the land portion of the above mentioned boundary and of the boundary following the course of the midstream of the main channel of the river Ganges as determined on the date of demarcation and not as it was on the date of the Award. The demarcation of this line shall be made as soon as possible and at the latest within one year from the date of the publication of this decision.

DISPUTE II

The dispute concerns that portion of the common boundary between the two Dominions which lies between the point on the river Ganges where the channel of the river Mathabhanga takes off according to Sir Cyril Radcliffe's Award and the northernmost point where the channel meets the boundary between the thanas of Daulatpur and Karimpur according to that Award.

Mr. Justice Chandrasekhara Aiyar opines as follows: —

(See Appendix IV.)

The conclusion of Mr. Justice Chandrasekhara Aiyar is as follows: —

(*a*) Sir Cyril's line in the Award map (Document No. 72) showing the bhanga river in red ink is to be adopted as the boundary.

(*b*) If this is not possible, the river Mathabhanga shall be taken as that which commences from the loop of the Ganges as found in the congregated air map (Document No. 164) and the boundary shall be along the middle line of the main stream from the point of the said off-take to the northernmost point where the line meets the boundary of the thanas of Daulatpur and Karimpur; the off-take point of the river as now demarcated shall be connected by a shortest straight line with the point nearest to it on the midstream of the main channel of the river Ganges. The centre line shall be a rigid boundary and demarcated accordingly as on the date of Sir Cyril's Award or, if this is found impossible, as on the date of this decision.

Mr. Justice Shahabuddin opines as follows: —

(See Appendix V.)

The conclusion of Mr. Justice Shahabuddin is as follows: —

The boundary line in this case is a fluid boundary and not a rigid one, and it shall run on water along the course described in the statement of the case of Pakistan, subject only to such geographical variations as may result from changes occurring in the course of the river Mathabhanga.

The Chairman opines as follows: —

(See Appendix VI.)

The conclusion of the Chairman is as follows: —

The boundary between India and Pakistan shall run along the middle line of the main channel of the river Mathabhanga which takes off from the river Ganges in or close to the north-western corner of the district of Nadia at a point west-south-west of the police station and the camping ground of the village of Jalangi as they are shown on the air photograph map of 1948, and then flows southwards to the northernmost point of the boundary between the thanas of Daulatpur and Karimpur.

The point of the off-take of the river Mathabhanga shall be connected by a straight and shortest line with a point in the midstream of the main channel of the river Ganges, the said latter point being ascertained as on the date of the Award or if not possible as on the date of the demarcation of the boundary line in Dispute I. The said point so ascertained shall be the south-eastern most point of the boundary line in Dispute I, this point being a fixed point.

Having regard to the fact that the Members have disagreed and that the Chairman has disagreed with both of them and giving effect, therefore, to the terms of section (2) of the Delhi Agreement under which the view of the Chairman has to prevail, the Tribunal gives the following: —

Decision

The boundary between India and Pakistan shall run along the middle line of the main channel of the river Mathabhanga which takes off from the river Ganges in or close to the north-western corner of the district of Nadia at a point west-south-west of the police station and the camping ground of the village of Jalangi as they are shown on the air photograph map of 1948, and then flows southwards to the northernmost point of the boundary between the thanas of Daulatpur and Karimpur.

The point of the off-take of the river Mathabhanga shall be connected by a straight and shortest line with a point in the midstream of the main channel of the river Ganges, the said latter point being ascertained as on the date of the Award or if not possible as on the date of the demarcation of the boundary line in Dispute I. The said point so ascertained shall be the south-eastern-most point of the boundary line in Dispute I, this point being a fixed point.

DISPUTE III

The dispute concerns the Patharia Hills Reserve Forest.

Mr. Justice Chandrasekhara Aiyar opines as follows: —

(See Appendix VII.)

The conclusion of Mr. Justice Chandrasekhara Aiyar is as follows: —

The portion to the west of the forest boundary line as drawn by Sir Cyril Radcliffe, Document No. 184, and shown in white in India's index map, Document No. 185, shall belong to East Bengal but the rest of the forest lying to the east of the said line shall belong to Assam.

Mr. Justice Shahabuddin opines as follows: —

(See Appendix VIII.)

The conclusion of the Chairman is as follows: —

The boundary line delineated on the map of the Award accords with the description given in the Award, and that line shall be the boundary line in this area and the portion of the forest to the west of that line, *i.e.*, the portion shown in white in the index map shall be awarded to East Bengal (Pakistan) and the portion to the east of the line, *i.e.*, the portion shown in blue in the index map to the Province of Assam (India).

The Chairman opines as follows: —

(See Appendix IX.)

The conclusion of the Chairman is as follows: —

The line indicated in the map "A" attached to the Award is the boundary between India and Pakistan.

Now, therefore, in view of the unanimous conclusions of the Chairman and the Members, the Tribunal gives the following: —

Decision

The red line indicated in the map "A" attached to the Award given by Sir Cyril Radcliffe in his Report of August 13th, 1947, is the boundary between India and Pakistan.

DISPUTE IV

The dispute concerns the course of the Kusiyara river.

Mr. Justice Chandrasekhara Aiyar opines as follows: —

(See Appendix X.)

The conclusion of Mr. Justice Chandrasekhara Aiyar is as follows: —

The line drawn by Sir Cyril Radcliffe from the north-western corner of the Patharia Hills Reserve Forest up to the point "B" in the Award map (Document No. 342) is the correct boundary line.

The line BC in the Award map is correctly shown as the Kusiyara river and will constitute the boundary between East Bengal and Assam.

Mr. Justice Shahabuddin opines as follows: —

(See Appendix XI.)

The conclusion of Mr. Justice Shahabuddin is as follows: —

The boundary in this area shall run along the southern river, *i.e.*, the river wrongly described as Sonai in the Award map, from the point where the land boundary running from the south to the north meets the said river, to the point from where that river takes its waters through Noti Khal from the northern river, *i.e.*, the river named on the said map as Boglia, and thence along the latter river to the boundary between the districts of Sylhet and Cachar.

The Chairman opines as follows: —

(See Appendix XII.)

The conclusion of the Chairman is as follows: —

From the point where the boundary between the thanas of Karimganj and Beani Bazar meets the river described as the Sonai river on the map "A" attached to the Award given by Sir Cyril Radcliffe in his Report of August 13th, 1947 (Gobindapur) up to the point marked "B" on the said map (Birasri) the red line indicated on the said map is the boundary between India and Pakistan.

From the point "B" the boundary between India and Pakistan shall turn to the east and follow the river which according to the said map runs to that point from the point "C" marked on the said map on the boundary line between the districts of Sylhet and Cachar.

Having regard to the fact that the two Members have disagreed in their views and that the Chairman has agreed with Mr. Justice Chandrasekhara Aiyar, and giving effect, therefore, to the terms of section (2) of the Delhi Agreement under which the view of the Chairman has to prevail, the Tribunal gives the following.

Decision

From the point where the boundary between the thanas of Karimganj and Beani Bazar meets the river described as the Sonai river on the map "A" attached to the Award given by Sir Cyril Radcliffe in his Report of August 13th, 1947 (Gobindapur) up to the point marked "B" on the said (Birasri) the red line indicated on the said map is the boundary between India and Pakistan.

From the point "B" the boundary between India and Pakistan shall turn to the east and follow the river which according to the said map runs to that point from the point "C" marked on the said map on the boundary line between the districts of Sylhet and Cachar.

Done at DACCA in triplicate original, January 26, 1950.

Algot BAGGE.

N. CHANDRASEKHARA AIYAR.

M. SHAHABUDDIN.

APPENDIX I

Opinion of the Hon'ble Mr. Justice H. Chandrasekhara Aiyar on Dispute No. I

1. Sir Cyril Radcliffe was appointed Chairman of what is known as the Bengal Boundary Commission constituted for dividing Bengal and Assam between the Dominions of India and Pakistan. The Commission consisted of two Hindu members and two Moslem members, besides the Chairman. The members were unable to arrive at an agreed view on any of the major questions, and Sir Cyril as Chairman was invited to pronounce his own decision, which by virtue of Section 3 of the Indian Independence Act, 1947, was to become the award of the Commission as a whole. He did so on the 12th of August 1947 and sent up a report to His Excellency the Governor-General of India.

2. It may be mentioned even at the outset that Sir Cyril Radcliffe did not attend the public sittings of the Commission and did not hear the representations made on behalf of the contending parties. He did not make any local inspection. He tells us in paragraph 5 of his report that he however made arrangements "to study daily the record of the proceedings and all material submitted for our consideration". He discussed the issues with his colleagues.

3. To his report are appended annexures A and B. The demarcation of the boundary line between East and West Bengal is described in detail in annexure A. The boundary line is also shown in red in the map annexure B. In paragraph 10 of the report, Sir Cyril says, "The map is annexed for purposes of illustration; and if there should be any divergence between the boundary as described in annexure A and as delineated in the map annexure B, the description in annexure A is to prevail".

4. India and Pakistan were not agreed, after this award, on the interpretation to be placed on some parts or portions of it specifying the boundary line. So, an agreement was reached between them at Delhi in December 1949 that a Tribunal should be set up for the adjudication and final settlement of certain disputes arising out of the interpretation of the award and for demarcating the boundaries accordingly. The present Tribunal has come into existence as a result of this Delhi agreement.

5. The disputes to be decided by this Tribunal are referred to in paragraph 2 (A) and (B) of the Delhi agreement in the following terms: —

> "(A) East-West Bengal disputes concerning—
>
> (i) the boundary between the district of Murshidabad (West Bengal) and the district of Rajshahi including the thanas of Nawabganj and Shibganj of pre-partition Malda district (East Bengal); and
>
> (ii) that portion of the common boundary between the two Dominions which lies between the point on the river Ganges where the channel of the River Mathabhanga takes off according to Sir Cyril Radcliffe's Award and the

northernmost point where the channel meets the boundary between the thanas of Daulatpur and Karimpur according to that Award.

"(B) East Bengal-Assam disputes concerning—

(i) the Patharia Hill Reserve Forest; and

(ii) the course of the Kusiyara river."

6. The tribunal held part of its sittings at Calcutta and another part at Dacca. At the Calcutta sittings, the disputes between East and West Bengal were heard and at the Dacca sittings those between East Bengal and Assam were heard.

7. It is not improper on my part to do so, I must express deep gratitude to the Chairman, Herr Algot Bagge, Lord Justice of Sweden. He was a model of patience and kindness and conducted the proceedings of the Tribunal with dignity and in a spirit of sweet reasonableness. I must also express my thankfulness to my colleague, Mr. Justice Shahabuddin, for his unfailing courtesy and kindness. The leading Council for India and Pakistan, Sir S. M. Bose (Advocate General of West Bengal) and Messrs. W. W. K. Page, K. C., and Faiz Ali (Advocate General of East Bengal) deserve praise for the lucidity and brevity of their arguments and the help they rendered to the Tribunal in finishing its labours within a comparatively short period. The Secretary-General, Mr. Sydow, and the Joint Secretaries, as well as, the staff, were very helpful.

8. Before proceeding to discuss the points arising for decision, I may say a word about the map appended as annexure B to Sir Cyril's Award. It is marked Document No. 72 in these proceedings and will be generally referred to as the award map. The endorsement on the map shows that map was compiled in the Bengal Drawing Office in 1944. It is agreed between both parties that it was prepared on the basis of a Survey in the year 1915-16. Neither side is able to tell us how Sir Cyril got this map and from whom. There is not much point however in harping on these deficiencies. As arbitrator, Sir Cyril used this map and drew the boundary line in it between East and West Bengal in red ink. We are bound by it, except in so far as there is any discrepancy or divergence between the boundary line as drawn in the map and the line as specified in annexure A in which event the latter has to prevail.

9. Paragraphs 4 and 5 of annexure A run in these terms: —

"Paragraph (4). From that point, the line shall run along the boundary between the following Thanas:

"Balurghat and Panchbibi; Balurghat and Joypurhat; Balurghat and Dhamairhat; Tapan and Dhamairhat; Tapan and Patnitala; Tapan and Porsha; Bamangola and Porsha; Habibpur and Porsha; Habibpur and Gomastapur; Habibpur and Bholahat; Malda and Bholahat; English Bazar and Bholahat; English Bazar and Shibganj; Kaliachak and Shibganj; to the point where the boundary between the two last mentioned thanas meets the boundary between the districts of Malda and Murshidabad on the river Ganges.

"Paragraph (5). The line shall then turn south-east down the river Ganges along the boundary between the districts of Malda and Murshidabad; Rajshahi and Murshidabad; Rajshahi and Nadia; to the point in the north-western corner of the district of Nadia where the channel of the river Mathabhanga takes off from the river Ganges. The district boundaries, and not the actual course of the river Ganges, shall constitute the boundary between East and West Bengal."

(The underlining is mine).

10. These two paragraphs have given rise to the first dispute between the parties and the question is whether the boundary indicated or specified in paragraph 5 is a rigid and fixed line as contended for India, or whether it is a fluid line shifting with the course of the river Ganges from time to time, which was the contention advanced on behalf of Pakistan. The trouble arises out of the fact that the boundary line specified in paragraph 5 as dividing the districts of Rajshahi and Murshidabad, and the districts of Rajshahi and

Nadia is along the course of the river Ganges, except in one part to which I shall refer later.

11. In view of the very clear language used by Sir Cyril Radcliffe, it appears to me that the position taken up by Pakistan to the effect that the boundary is a shifting or a fluid one, liable to change or alteration according as the river Ganges fluctuates or varies in its course, is untenable. The length in dispute would be about 60 to 70 miles according to the scale specified in the map (1″ being equal to 8 miles). I shall briefly give my reasons for this conclusion.

12. We must presume or assume that Sir Cyril Radcliffe was in full possession of all the materials to enable him to pronounce the report. In fact, he says so. Therefore, we must take it that he had before him the several notifications and also maps relied on by either side giving the thana as district boundaries of various localities. He was also aware of the fact that in this particular portion the boundary line ran along the river Ganges. Express reference is made to this fact in the opening sentence of paragraph 5 "The line shall then turn south-east down the river Ganges". With all this knowledge, if Sir Cyril Radcliffe still said at the end of the paragraph that "The district boundaries and not the actual course of the river Ganges shall constitute the boundary between East and West Bengal", he could have meant only one thing. He definitely intended to rule out a fluid boundary and to have a fixed or rigid boundary between the two States. Surely, Sir Cyril could have said, if Pakistan's contention is right, that the line shall then turn south-east down the river Ganges and go along its course "to the point in the north-western corner of the district Nadia". To accept the argument of Pakistan would be not only to neutralise the final sentence in the paragraph but to ignore it altogether. I am not prepared to hold that the last sentence in paragraph 5 is merely tautological, as Mr. Page had to contend it was.

13. Mr. Page referred in the course of his argument to the principle of international law that where a navigable river is a boundary between two sovereign States, the line of the midstream is regarded as the dividing line. The question before us however is whether it governs us in the present case or whether its application has been excluded by Sir Cyril Radcliffe. It is hardly necessary to point out that the doctrine applies only where there is no specific or express agreement between the parties, and there is nothing else to the contrary. It is open to the two States to vary it and have a different boundary if they so choose. In is book on International law (Third edition—1948), Mr. Fenwick says at page 373—

> "In some European treaties, an effort has been made to give a great degree of stability to river boundary-lines by locating the *thalweg* definitely by means of fixed points which were to constitute permanent landmarks for the future. In the Treaty of Versailles of 1919, provision was made that the principal channel of navigable rivers should be the dividing line; but it was further provided that it should be left to the several boundary commissioners appointed by the Treaty to determine whether the boundary-line should follow subsequent changes of the channel or should be definitely fixed by the position of the channel at the time".

14. Instances have been referred to in the leading text-books where specific agreements between the States have deviated from the *thalweg* rule.

15. Several notifications were referred to on the side of Pakistan to reinforce the argument that the midstream or the flowing stream of the Ganges or the Padma or some other river was referred to as the boundary between districts or subdivisions. From this alone, it does not follow that the district boundaries, where they happen to coincide in whole or in part with the course of a river, must be ignored in favour of the middle stream or main stream theory. There might be valid reasons for holding on to the district boundaries despite a natural boundary like a river. Sir Cyril Radcliffe, undoubtedly know the principle of international law. He presumably knew of the notifications constituting rivers as boundaries in some cases. But still he took care to say in his award that the district boundaries and not the course of the river shall constitute the dividing line.

16. Up to the northern point where the boundary between Kaliachak and Shibganj Thanas meets the boundary between the districts of Malda and Murshidabad on the river Ganges, the river runs entirely in the Indian Dominion. From below the point on the river Ganges, where the channel of the river Mathabhanga takes off—which is referred to in paragraph 6 of the award—the river Ganges is entirely in the Pakistan territory of East Bengal. The dispute is only as regards the boundary line between the said two points, which is a comparatively small stretch of 60 to 70 miles as stated already.

17. It would be see from the District map of Rajshahi (Document 77) and the notification of the boundaries of the District as found at page 187 of India's document (Doct. 67) and page 24 of Pakistan's documents (Doct. No. 105) (the relevant passage is at pages 189 and 26 respectively) that the boundary line specified by Sir Cyril Radcliffe in paragraph 5 consists in part of a land boundary, *i.e.* running over or through a *char* area thrown up by the Ganges in the course of its erratic flow. It is conceded by Pakistan in paragraph 5 of its case that this is a land boundary. The words used are "excepting in the *char* area in the river Ganges opposite the Rajshahi town where the boundary line runs over land". This land boundary is clearly delineated in the district map of Rajshahi filed by India. It is incorporated so to say and forms part and parcel of boundary line specified by Sir Cyril Radcliffe.

18. If we favour the construction placed by Pakistan and hold that Sir Cyril had in his mind a fluid line along the middle stream of the river Ganges as the boundary to demarcate the two sovereign States, we shall be face to face with the position that if and when the river Ganges changes its course, as it well might at any time, having regard to its extreme waywardness or eccentricity, the boundary will of course have to change with the river according to the principle of international law, and we may probably get disconnected from the land boundary in the *char* area at one or both ends. What is to happen then, unless we resort to some unauthorised process of joining the two *char* ends to the nearest points of the middle stream of the Ganges in its new or altered course, as indicated by Mr. Page in the two oil-painting sketches prepared and filed by him (Docts. 165 and 166)? In such an event, we may have to abandon the land boundary altogether. But can we do so? Obviously not.

19. It would be seen from the papers produced on behalf of and relied on by Pakistan before the Boundary Commission (Docts. 119 and 120) that there was an acute controversy over the Rampur-Boalia area to the south of the Rajshahi town. This is the *char* area, if we may roughly call it so. Is there anything unreasonable in thinking that Sir Cyril wanted to put an end to this fight about this area in particular once and for all by specifying the district boundaries and eliminating in express words the river course as a boundary so that the future of that area need not depend upon the whims and fancies or the ficklemindedness of the river?

20. Regard must also be had to the use of the word "actual" in the sentence "and not the actual course of the river Ganges". If he had merely said, "the course of the river Ganges", two results would have followed; one is that a doubt might well have arisen whether he was not thinking of the possible, potential or future course of the river in the progress of time; another is that the *char* area, a portion of which he was now giving to India on the basis of the district boundary line, might cease to belong to India if the river changes its course; and he probably wanted to avoid this.

21. It is perfectly obvious that as regards the *char* stretch of territory in an around Rampur-Boalia, there is no room for any controversy. The river Ganges does not there flow between two States. It lies entirely within Indian territory; Pakistan has no claim to the river here; and, therefore, there is no scope for the application of any international law or for any theory about the main stream of a flowing river being the boundary. Faced with this difficulty, Mr. Page, the leading Counsel for Pakistan, whose services ceased to be available for that Dominion for reasons which are unnecessary to go into at present but which are found in a rather extraordinary petition filed on the side of Pakistan by its learned Advocate General Mr. Faiz Ali, had to resort to a rather inscrutable theory of

connecting *char* ends with the midstream points of the changed course of the Ganges along the shortest line or lines.

22. We have little to do with the reasons which might have led Sir Cyril to adopt this particular line of division. It is possible that the fight over the Rampur area might have influenced him. It is equally possible that having regard to the fact that he was here having only a small stretch of boundary, he did not want complicated questions of international law to arise based on assertions and counter-assertions, on the part of the two sovereign States (who were by no means friendly) about the future changes in the course of such a forceful and wayward river, which could be settled only by treaty or war, and not by resort to any courts of law. When the two parts of a territory or area belong to one sovereign State, the boundary line could be changed by appropriate orders in the shape of notifications or otherwise whenever it is found necessary owing to the boundary river altering its course. But no such change could be effected when the areas belong to different countries, unless they choose to agree on a particular line of action. It is not at all surprising, therefore, that Sir Cyril took care to say that the district boundaries and not the actual course of the river Ganges shall constitute the boundary between East and West Bengal.

23. The overriding purpose or object of the division must be borne in mind in construing the award. The idea was to bring into existence two independent Sovereign States which would have nothing more to do with each other except as the result of treaty or agreement or adjustment. The interpretation of the boundary on the basis of a fluid line would definitely frustrate this idea if the river changes its course. Pakistan territory might become Indian territory and *vice versa*; and pockets might be created in each State of what must be regarded as foreign territory. How is the government to be carried on of such areas? What is to happen to the administration, and what would be the method of approach to the pockets situated in the centre of one State surrounded on all sides by an area belonging to an alien State? Surely, a person of the eminence and experience of Sir Cyril Radcliffe must have envisaged all these difficulties and made up his mind to provide for definite and inflexible boundaries. It is true that inconveniences may crop up as regards navigation and exchange of commerce, but such inconveniences will have to be faced by both the States; and if they are so minded as not to come to any agreement or treaty but desire to continue their hostilities or antagonistic propensities to the bitter end, they must suffer. The rigid boundary would probably bring the two States nearer each other than it would be otherwise; necessity will compel them to find a solution and come to an agreement about the user of the waters for purposes of navigation on the side of the other State. To me it appears that having regard to the primary object in view, the governing purpose, if we may use such an expression, the fluid line theory based on the principle of international law must be ruled out altogether in the present case and also as regards the Mathabhanga river to be dealt with presently under Dispute No. II.

24. Further, though it is theoretically possible to conceive of a boundary which is fixed in portions and flexible in other portions, yet when the stretch of boundary is found to be interspersed with land areas here and there, it would be extremely inconvenient, if not impossible, to work the boundary on the basis suggested by Pakistan. As indicated already, there is every possibility of the land area getting detached from the middle stream line if the river chooses to become erratic at any particular part or over a particular stretch, and the areas, though they belong to Pakistan or India according to the division, may suddenly come to belong to the other sovereign State, under a totally different set-up-political, economic and social. As I have pointed out already in the earlier portions of this opinion, matters would be quite different if the question arose as between two provinces under the same Government, or between two States not totally independent of each other, but owing adherence or allegiance to a central authority, and subject to the jurisdiction of a federal or supreme court, which could decide questions arising between the two States as if they were between two individuals.

25. If the middle stream of the river Ganges is the boundary, then *ex-hypothesi*, there can be no disruption of the line at any time. As the river changes, the middle stream

line will change and with it the boundary. There can be no break in the boundary—not abrupt or dispointed or disconnected ends.

26. So, on any given date, the boundary can be demarcated by joining the two ends of the middle stream—be the line straight or curved or wavy. This can be easily illustrated by simple pencil sketches.

27. Let us suppose that AB are flexible points whose connecting line divides two districts. If the districts have to be divided off from each other, all that has to be done is to draw a line between AB on the date of division. The flexibility of the two points has nothing to do with the possibility of actual division on a particular date by joinder of these two points.

28. What did Sir Cyril say? Here, again, let us take that AB is the district boundary line—A and B being flexible on that date. He said that the said line—as it could be not only envisaged but also demarcated on the date of the award—shall divide the two States. There is nothing to prevent two flexible points being converted into rigid points at a division. He went further and said "the actual course of the river" will not be the boundary. When he used these words he must have had in his mind the shifting nature of the river and probably did not want that the district boundary line as it may come into existence at any future date owing to the river altering its course should be taken to be the dividing line. Obviously he was thinking of putting an end to future trouble by making the district boundary line as it could be fixed or settled or determined on that date as the boundary. If he did not add the said words, doubts might well have arisen to the effect that as the district boundary line runs along the midstream of the river, flexibility will continue as regards the boundary. He wanted to avoid this and so took care to use express language to silence any doubts and put an end to arguments based on inference or implication.

29. Let me paraphrase Sir Cyril's sentence. "The district boundaries" *i.e.*, the midstream of the river (as it exists today) and "not the actual course of the river", *i.e.*, the midstream which will fluctuate from time to time (if the course of the river is taken as the boundary), shall divide the two States. In other words, he wanted to have a permanent boundary, not a shifting one.

30. Sir Cyril must have definitely intended that the two States should be left in no uncertainty about their boundary line and that what was flexible till then—and no harm or trouble could arise out of such fluidity of boundary when we had only one State and one rule—should become rigid of permanent as he had to deal with two States whose territorial limits had to be ascertained and settled without possibility of future wrangle.

31. The very Delhi agreement under which the Tribunal is constituted contemplates elaborate demarcation operations in connection with the boundary line to be conducted by experts of both the States. What is there to demarcate, if the boundary is a fluid one liable to change or alteration at any moment? Is all the trouble to be taken only to ascertain what the boundary is on a particular date, knowing full well that it may not be the boundary the next day? Surveys of the river, cadastral or otherwise, will then be a futile endeavour; and topographical maps prepared at elaborate expense and cost by means of aerial photographs have to be thrown aside every time the river changes. It is very difficult to see the purpose behind so much trouble or the usefulness of such undertakings, if Sir Cyril intended a fluid boundary.

32. Finally, arises the question on what basis we are now to determine and demarcate the rigid boundary line. Are we to take the notification line of 1940 based on the survey of 1915-16, or are we to go by what the line was on the date of the award (August 1947), or can we say that the boundary should be fixed as on the present date? The first alternative is out of the question at this distance of time. It is possible that the district boundary on the date of the award can be ascertained and demarcated; and if this assumption is correct, this is the next alternative. If, however, even this is not possible, the only other practical solution will be to demarcate the boundary line, *i.e.*, the midstream line of the Ganges and the land boundary within a particular period to be fixed—let us say, as soon as possible within one year from the date of the publication of the award. The

line has to be demarcated as contemplated in paragraph 3, sub-clause (3) of the Delhi agreement.

N. CHANDRASEKHARA AIYAR.

APPENDIX II

Opinion of the Hon'ble Mr. Justice Shahabuddin on Dispute No. I

This dispute relates to the boundary between the two Dominions from the point on the river Ganges where the boundary between the thanas of Kaliachak and Shibganj meets the boundary between the districts of Malda and Murshidabad to the point in the north-western corner of the district of Nadia where the channel of the river Mathabhanga takes off from the river Ganges. The boundary between these two points as described in the concluding portion of paragraph 4 and in paragraph 5 of Annexure A to Sir Cyril Radcliffe's Bengal award runs down the river Ganges along the boundary between the districts of Malda and Murshidabad, Rajshahi and Murshidabad and Rajshahi and Nadia. The boundary between these districts according to the relevant notifications was the midstream of the Ganges except across Rampur-Boalia *char* where the boundary runs on land. This description is followed by the sentence on the interpretation of which the decision in this case rests, and that sentence is "The District Boundaries, and not the actual course of the river Ganges, shall constitute the boundary between East and West Bengal".

The case for India is to the following effect. The words "and not the actual course of the river Ganges" mean that the river sould not be the boundary. Had these words not occurred in the award different considerations might have arisen, but these words clearly indicate that Sir Cyril ignored the river altogether because he knew it might shift its course. He therefore laid down a fixed line which he delineated on the map, and that is the line of demarcation to be worked out on the site.

Pakistan's case, on the other hand, is that the correct interpretation of the second sentence in paragraph 5 of Annexure A is that the district boundaries *i.e.*, the midstream of the river Ganges for the time being except across the Rampur-Boalia *char*, as distinguished from the factual existing course of the river at the date of the award, shall be the boundary. This boundary was not intended to be a fixed unalterable boundary. It is a river boundary subject to variations resulting from changes in its course. The words "and not the actual course" were used because Sir Cyril had decided to retain the fixed land boundary across the Rampur-Boalia *char* and also because he was not aware of the then existing course of the river Ganges, the map before him being one based on the survey of the river made as far back as 1915-16. The map is only an illustration and being divergent from the description in the award, the latter should prevail.

In order to decide which of the interpretations is correct it is necessary to determine what the expression "District Boundaries" in the sentence in question was intended to mean. Boundaries of districts are declared by notifications issued under Act IV of 1864. The relevant notifications prior to 1917 were of 1875 in which the boundary between the districts with which we are concerned was defined as the flowing stream of the Ganges, or river Ganges. After 1915-16 survey, when maps had to be prepared, the question arose whether the notifications should be interpreted according to the existing position of the river or according to the position it occupied when those notifications were made and if the former whether fresh notifications were necessary. The Government decided that maps should be prepared on the supposition that "the centre of the stream which for the time being is the main stream" of the Ganges is the boundary and that no fresh district notifications were necessary. (Documents 107, 125, and 108). Subsequently a district notification, regarding the boundaries of Rajshahi district was issued in 1940 and a similar notification about the boundaries of Malda district was issued in 1942, but these were not issued on account of any change in the course of the river. (Documents Nos. 105 and 106). They were issued in respect of changes in the land boundary only. In both these notifica-

tions it is stated that the village boundaries mentioned therein were the boundaries as demarcated at the survey operations that had taken place long before the notifications; but no such statement is made therein regarding the river boundary, which is referred to as "the midstream of the river Ganges" in the case of Rajshahi district and "the midstream of the main channel of the Ganges or Padma river" in the case of Malda district, and not as the midstream of the year of the Survey. These notifications were therefore based on the Cadastral Survey only in respect of the land boundaries and not in respect of the river boundary. From the above documents it is clear that the midstream when declared to be the boundary between districts means the midstream for the time being *i.e.*, the midstream wherever it may be whenever the question arises, and that no fresh notification is necessary when the midstream changes, as the midstream even after the change would still continue to be the district boundary, and that it is only when there is a change in the land boundaries of the district that a fresh notification is necessary.

In respect of other rivers which divided the districts of Mymensingh and Pabna in one case and Jessore and Khulna in another case the same principle was stated by the East Bengal and Assam Government in Document No. 109 and by the Government of India in Document No. 114.

Sir Cyril, when he decided to adopt the district boundaries, must have known that the district boundary in question was the midstream wherever it may be whenever the question arises, except across the Rampur-Boalia *char*. When he made the district boundary, the boundary, he could not have meant by the words "and not the actual course of the river" that the river should not be the boundary, for, if in the sentence in question, for the words "district boundary" the meaning of that expression stated above is substituted and the words "and not the actual course of the river" are taken to exclude the river altogether as boundary, the sentence does not make sense. The words "and not the actual course of the river" were evidently used to emphasise that the land boundary across Rampur-Boalia *char* should be maintained as against the river line in this area. These words therefore mean that wherever the district boundary is not the actual course of the river, the district boundary should be followed and not the actual course of the river. The district boundary itself no doubt recognised the land boundary across the *char*, but emphasis had to be laid on it owing to the keen controversy about the *char* before the Radcliffe Commission.

There is no reason to think that Sir Cyril was averse to making the river a boundary. It is clear from the language of paragraph 6 of the Annexure A that Sir Cyril intended the river Mathabhanga to be a boundary. In paragraph 8 of the same Annexure he made the district boundary the boundary between Khulna and 24 Pargans, although for about 50 to 60 miles the river formed part of that boundary. In the Sylhet award he made the river Kusiyara a boundary between East Bengal and Assam. Paragraph 11 of his Bengal award indicates that he fully realised the importance of rivers to the life of provinces. Extracts from arguments advanced before the Radcliffe Commission show that the parties concerned preferred a river boundary and in fact pressed for it. Navigable rivers are of considerable importance and they constitute boundaries between independent states and are also recognised as good boundaries under the International Law. To people of both the Dominions living in the districts on both sides of the river Ganges, the river is of great importance. Sir Cyril must have kept this in view while determining the boundary line. In clause 2 of paragraph 8 of his award he set for himself the question whether the attractions of Padma-Madhamati river line displaced the strong claims of the heavy concentrations of Muslim majorities in the districts of Jessore and Nadia. He did not decide on a river boundary in that area as the other consideration was far weightier. But in the area with which we are concerned in this case there were no such considerations that could outweigh the advantages of a river boundary.

On the other hand, Sir Cyril must have considered it necessary and advantageous to both parties to have a flexible boundary in this area. He gave Murshidabad to West Bengal, although it was a predominantly Muslim area, because he took the view that it was essential for the life of Calcutta that West Bengal alone should have control over the territory in which Bhagirathi and its tributaries take off from the Ganges. Having done that, he could not have intended the boundary between East and West Bengal in this area

to be rigid for, if the Ganges were to flow into Pakistan in the region where the Bhagirathi and its tributaries take off, West Bengal would cease to have control over the head waters of these rivers.

That Bhagirathi and other rivers have been taking off from the Ganges even when it changed its course is seen from the last map in Document No. 136. Even if it so happens that when the Ganges changes its course the Bhagirathi and other rivers do not take off from the Ganges, still, West Bengal, if the boundary is flexible, can through canals secure sufficient supply of water to save the Bhagirathi and its tributaries from drying up.

It is true that when the river changes its course people living in the neighbourhood are inconvenienced, but this disadvantage pales into insignificance when the disadvantages of a fixed boundary are taken into consideration. The Ganges is an erratic river and when it shifts its course it does not do so uniformly in one direction but flows zig-zag with the result that if the boundary line is a fixed one the river will be flowing in some of its portions on the Pakistan side of the line and in some on the Indian side. This would raise serious difficulties for the passengers and goods of both the states not at one but at several places. Sir Cyril could not have failed to take notice of this important fact. If however he had the idea of fixing a rigid boundary he would in my opinion have definitely said that the line he was drawing would be a rigid line. If he had been averse to a river boundary he would not have made about ten miles of the river Mathabhanga the boundary in the second dispute or about 60 miles of the river a part of the boundary between Khulna and 24 Parganas or the river Kusiyara the boundary in paragraph 13 of the Sylhet Award.

I am therefore of the opinion that the words "and not actual course of the river Ganges" were used, as already stated, only to emphasise that the land boundary across the *char* should not be disturbed and not to indicate a rigid boundary.

As for delineation on the map, Sir Cyril has made it clear in paragraph 10 of his award that the map was intended as an illustration and that, if there be any divergence between the description in Annexure A and the map, the former shall prevail. The map which was used by Sir Cyril was based on the Survey of 1915-16. Sir Cyril must have known that it did not represent the actual state of the river on the date of the award. The language in which he had described the boundary line in paragraphs 4, 5, and 6 of Annexure A (for example, "the point where the boundary between the last mentioned thanas meets the boundary between the districts of Malda and Murshidabad on the River Ganges"; "the line shall then turn south-east down the River Ganges."; "to the point . . . where the channel of River Mathabhanga takes off from the River Ganges"; and "where the channel of River Mathabhanga takes off to the northern most point where it meets the boundary between the thanas of Daulatpur and Karimpur") (underlining is mine) clearly indicates that Sir Cyril was referring to the position of the river on the date of the award and thereafter and not to the midstream of any of the past years, much less to the midstream of the survey of 1915-16. The telegram of the Prime Minister of India to the Prime Minister of Pakistan (Document No. 121) with regard to this very boundary states that ". . . since maps were last made there have been considerable changes in the position of rivers. It is essential therefore to prepare a proper topographical map of country three or four miles wide across the boundary. After the map has been prepared demarcation of boundary on the ground and marking of the boundary on map will be easy". In the joint proposals of Surveyor General of India and Director General of Surveys, Pakistan (Document No. 123) it is stated that ". . . the existing maps (including those which have evidently been used in defining the boundary for the Radcliffe Award) are inaccurate and out of date . . . It is therefore considered that any attempt to reach agreement as to the proper course of the boundary with the aid of these maps alone is almost certain to result in failure, since there are bound to be discrepancies between individual maps and between the maps and the ground . . .". In the circumstances delineation in Annexure B has to be considered as divergent from the description in Annexure A and cannot be relied on for the purposes of demarcation.

It was contented by the Learned Counsel for India that if the boundary be made flexible there might be difficulties in connecting the extremities of the land boundary on

Rampur-Boalia *char* with the midstream on either side. But as explained by the Learned Counsel for Pakistan, either end of the land boundary can always be connected with the midstream wherever it may be and in case the river takes a sudden turn and leaves its bed the principles of avulsion would apply. The Ganges however has not been known to take such sudden and violent turns. In any case the land boundary has to be connected with the midstream even if the entire boundary in this area is considered to be rigid, because the fixation of a rigid boundary should be made only with reference to the position of the river on the date of the award, and if for any reason that is not possible or convenient, with reference to the position of the river at the present day. The position of the river at the time of 1915-16 survey some thirty years back cannot be taken as the basis for demarcation, nor is the adoption of such a course practicable or just and reasonable. In the case of a flexible boundary the connecting lines in this part of the river would no doubt have to be readjusted whenever the midstream changes, but when once the initial connection is made and the pillars are planted, which has to be done in any case, readjustment in case the river changes would not be difficult.

I am therefore clearly of the opinion that the construction put by Pakistan on the award in connection with this dispute is correct and reasonable, that the boundary in this area, except over the Rampur-Boalia *char* is flexible and not rigid and that the boundary line shall run along the course described in the Pakistan statement of the case, subject only to such geographical variations as may result from changes occurring in the course of the river Ganges.

M. SHAHABUDDIN.

APPENDIX III

The opinion of the Chairman on Dispute No. I

The case submitted in this dispute on behalf of the Government of India is that the line marked by Sir Cyril Radcliffe in Annexure B of his award is the actual line of demarcation to be worked out on the site and that in consequence this line shall be rigid, not shifting according to the course of the river Ganges.

The case submitted by the Government of Pakistan is that upon a proper construction of the award, the district boundary is and is to remain the boundary between India and Pakistan subject only to such geographical variations as may result from changes occurring in the course of the river.

The relevant portion of the Award in Annexure A is in this respect as follows: —

"4. From that point a line shall run along the boundary between the following Thanas: —

"... Kaliachak and Shibganj; to the point where the boundary between the two last mentioned thanas meets the boundary between the districts of Malda and Murshidabad on the river Ganges.

"5. The line shall then turn south-east down the River Ganges along the boundary between the districts of Malda and Murshidabad; Rajshahi and Murshidabad; Rajshahi and Nadia; to the point in the north-western corner of the District of Nadia where the channel of the River Mathabhanga takes off from the River Ganges. The district boundaries, and not the actual course of the River Ganges, shall constitute the boundary between East and West Bengal."

The boundary between Rajshahi and Murshidabad districts was last notified, before the Partition, under Bengal Act IV of 1864, by notification No. 10413-Jur., dated 11th November, 1940. This notification while describing the boundary between Rajshahi district and adjoining districts (Nadia and Murshidabad) going in the direction up the river Ganges States as follows: —

"thence along the south-western boundary of Naosara Sultanpur (209), southern boundary of Fatepur Palasi J.L. No. 190, up to the midstream of the Ganges, police-

station Charghat, thence along the midstream of the Ganges up to a point near the south-east corner of village Char Rajanagar (J.L. No. 99), police-station Raninagar in the district of Murshidabad; thence northward along the eastern boundary of Char Rajanagar up to the south-east corner of Diar Khidirpur (No. 243 of police-station Boalia), thence along the southern and western boundaries of Diar Khidirpur, thence along the southern boundary and part of western boundary of Char Khidirpur (235), thence along the southern boundary of Taranagar (232), thence along the eastern boundary of Majher Diar (231), up to the midstream of the Ganges, thence along the midstream of the Ganges up to the junction of the midstream of the Ganges and the Mahnanda, river, . . ."

The district boundary between Malda and Murshidabad was notified last, before the Partition, by notification No. 2667-Jur., dated 6th March, 1942, under Bengal Act IV of 1864. This notification, while describing the southern boundary of the district of Malda (*i.e.* the boundary between Malda and Murshidabad districts), states as follows: —

"up to the junction with the trijunction point of districts of Rajshahi, Malda and Murshidabad on the main channel of the Ganges or Padma river.

"South-western and western boundary of the district.

"Thence towards north-west and north along the midstream of the main channel of the Ganges or Padma river up to the junction with the trijunction point on the main channel of the districts of Malda, Santhal Parganas and Purnea . . .".

The northern and north-eastern boundary of the Murshidabad district (*i.e.* the district boundary between Murshidabad on one side and Rajshahi and Malda on the other) was notified under the notification dated February 11th, 1875, as following the stream of the rivers "Ganges" and "Pudda". After that there is no district notification of Murshidabad covering the disputed area, but if the Thana notifications up to 1931 are congregated then the line so formed will tally with the boundary line of Rajshahi and Malda.

According to these notifications the district boundary between Malda and Murshidabad was then "the midstream of the main channel" of the river Ganges and between Murshidabad and Rajshahi "the midstream of the river Ganges" with the exception of the *char* area in the river Ganges, opposite Rajshahi town, where the boundary line ran over land. The district boundary in consequence according to those notifications ran to about seven eighths in the Ganges and to about one eighth on land, *viz.*, the char area opposite Rajshahi town.

The first question to examine is whether the district notification line in the river Ganges consisting in "the midstream of the main channel of the river Ganges" or "the midstream of the river Ganges" was rigid and object of correction only through a new notification or if this line in the river Ganges was fluid line.

On behalf of the Indian Government it has been argued that the district boundary always was a rigid line, *i.e.*, when a notification declared the main stream of a river as the boundary, the main stream at the time of the notification was intended. The Pakistan Government on the other side contends that the district boundary in a river was not a fixed boundary in the sense of a demarcated line, but a notional boundary which depended on the existing course of the river. That will say that according to the Government of Pakistan if the main stream of the river left its old bed and formed a new one the district boundary line followed the new main stream of the river until and official notification made a change in the boundary.

The notifications contain no explicit disposition whether the notifications when talking of the midstream of the river Ganges mean the midstream of the Ganges at the time of the notification—rigid line—or the midstream of the river Ganges as it is any time until the next notification—a flexible line.

However, the correspondence in the Documents Nos. 110-118 indicates that the boundary between the districts by the Governmental authorities was held to be the centre

of the stream which at the time in question is actually the main stream, meaning thereby presumably at any time when the question of the boundary came up.

It seems therefore not possible to hold that the district boundary in the river Ganges in the disputed area was a rigid line.

Another question is however whether the boundary between India and Pakistan as established in the award is embodying the flexible line of the district boundaries or whether the boundary between India and Pakistan is according to the award a stationary line.

It is stated in the award that "the line shall then turn south-east down the river Ganges along the boundary between the Districts of Malda and Murshidabad etc., . . . to the point in the north-western corner etc. . . .". Supposing that the award had not gone beyond stating this, the boundary between India and Pakistan having incorporated the district boundary would have been a fluid line in the river Ganges down to the *char* area opposite Rajshahi town, a rigid line over the *char* and then a fluid line in the river Ganges down to the point where the river Mathabhanga takes off. But the award continues that "the district boundaries, and not the actual course of the river Ganges shall constitute the boundary between East and West Bengal".

The flexible district boundaries which cover about seven-eighths of the boundary stretch now in question, were at the time of the award following the then actual course of the river Ganges.

To take the flexible district boundaries as the boundary between India and Pakistan would then be to have the flowing course of the river Ganges as the boundary on a great part of the boundary line. This would be contrary to the prescription in the award that the actual course of the river Ganges shall not constitute the boundary between East and West Bengal.

It has been maintained that another interpretation of the words "not the actual course etc." is possible, *viz.*, that the words have been used only to indicate that the boundary should run across the *char* area. But that should have been the result even without this sentence as it already has been stated in the description that the line should run along the boundary between the two districts, *i.e.*, across the *char* area. It is not possible that Sir Cyril Radcliffe who otherwise in the award has used very concise language just here should have expressed himself in terms which are purely tautological. These words must have a special meaning and according to my opinion the meaning is the one above explained.

The award then cannot mean the boundary to be a flexible line. Such an interpretation having been accepted, the question arises which rigid district boundary lines are meant in the description.

It would, in itself, seem to be a natural thing to interpret the expression "the district boundaries" in Annexure A with the help of the map in Annexure B. On this map there are drawn district boundaries on the stretch in dispute and Sir Cyril Radcliffe has followed these district boundaries in delineating the boundary between India and Pakistan on the stretch in question.

To consider the district boundaries drawn on the map as the district boundaries of the description offers no difficulty as regards the land boundaries. They are put down on the map as notified in the latest notifications and they show the district land boundaries at the time of the award.

But concerning the part of the district boundaries which are following the midstream of the river Ganges difficulties arise in making use of the map as regards the interpretation of the district boundaries of the description in Annexure A.

The map in Annexure B is a congregated map of the district maps used at the time of the latest notifications. As the district maps are based on a survey which was started in 1915 and completed in 1926, the map does not reproduce the position of the river at the

time of the notifications but at the time of the survey. The map, in fact, does on the stretch which is following the river Ganges not reproduce any other district boundaries than those determined by the position of the river Ganges at the time about thirty years ago when the survey maps were made on which the map in Annexure B is based. To interpret the words "district boundaries" in the description in Annexure A on this stretch as being the same as the district boundaries as determined by the position of the river Ganges as demarcated on the map in Annexure B does not seem possible. The district boundaries and the delineation of the boundary between India and Pakistan following these district boundaries in the river Ganges as demarcated on the map can therefore not be considered as having been meant as an illustration of the words "district boundaries" in the description so far as the district boundaries following the midstream of the river Ganges are concerned.

It remains then as regards the part of the district boundaries which is following the midstream of the river Ganges to decide whether to take the district boundaries as they were at the time of the latest notifications of the districts concerned or the district boundaries as they were at the time of the award.

The position of the district boundaries as they were at the time of the notifications depends so far as they are following the midstream of the river Ganges on the position of the river at the time of the different notifications. As the river Ganges certainly has shifted its course between the dates of these different notifications no continuous and common district boundary line can be taken as existing at the different dates of the notifications so far as the district boundaries of the notifications were determined by the midstream of the river Ganges.

The dates of the latest notifications therefore cannot be taken as the time for deciding the position of the district boundaries.

As regards then the time of the date of the award there is to be remembered the stipulation in Annexure "A" that the district boundaries and not the actual course of the river Ganges shall constitute the boundary between East and West Bengal. The interpretation given of this stipulation is that the boundary as determined by the district boundaries is to be a rigid and not a flexible line.

By taking the district boundary line at the time of the award as a rigid line you do not then come into conflict with the stipulation that the actual flowing course of the river Ganges shall not constitute the boundary.

My conclusion is therefore that in the area in dispute the district boundary line consisting of the land boundary portion of the district boundary as shown on the map, Annexure "B", and as described in the Notification No. 10413-Jur., of 11-11-40, and the boundary following the course of the midstream of the main channel of the river Ganges as it was at the time of the award given by Sir Cyril Radcliffe in his Report of August 12th, 1947, is the boundary between India and Pakistan to be demarcated on the site.

If the demarcation of this line is found to be impossible, the boundary between India and Pakistan in this area shall then be a line consisting of the land portion of the above mentioned boundary and of the boundary following the course of the midstream of the main channel of the river Ganges as determined on the date of demarcation and not as it was on the date of the award. The demarcation of this line shall be made as soon as possible and at the latest within one year from the date of the publication of this decision.

Algot BAGGE.

APPENDIX IV

Opinion of the Hon'ble Mr. Justice N. Chandrasekhara Aiyar on Dispute No. II

This dispute arises as regards the interpretation to be placed upon paragraph 6 of Annexure "A" to Sir Cyril Radcliffe's award. The paragraph is a short one and is in these terms—

"From the point of the river Ganges where the channel of the river Mathabhanga takes off, the line shall run along that channel to the northern-most point where it meets the boundary between the thanas of Daulatpur and Karimpur. The middle line of the main channel shall constitute the actual boundary".

The issue to be decided lies within a narrow compass but is a bit complicated. In his map Annexure "B", Sir Cyril has drawn a red line between the two points mentioned by him and has shown the red line as the Mathabhanga. It is contended for Pakistan that the course of the Mathabhanga has not been correctly shown by Sir Cyril and that as a matter of fact it takes off from the Ganges at a much higher point to the north-west and flows down south-wards in the direction of what is specified in the plan as "Mathabhanga R." with a dead end, so to say. Therefore it is argued for that Dominion that the red boundary line given by Sir Cyril from the northern point up to the point where it meets the boundary between the thanas of Daulatpur and Karimpur is a wrong demarcation of the boundary and that it should be really further west.

2. This claim is set out in paragraph 2 of Pakistan's case as the second subject-matter of dispute and is in these terms—

"At and before the date of the said Award, the Mathabhanga river took off and now takes off from the Ganges near village Godagaridiar J.L. No. 170 of Daulatpur P.S. and flowed as it now flows through mauzas Udainagar Khanda, J.L. No. 169, and Muradpur Diar J.L. No. 172 of Daulatpur P.S. Muradpur Jalangi P.S. of Murshidabad district and Mauza Madhugari J.L. No. 108 of Karimpur P.S. meeting the boundary between thanas Daulatpur and Karimpur near the south-western corner of Char Sarkarpara J.L. No. 178 of Daulatpur P.S.".

3. On the other hand, it is urged for India that the course of the Mathabhanga river is not what is claimed by Pakistan but is something different and that wherever the Mathabhanga might be, Sir Cyril has in fact assumed its course to be a particular one and as he has not merely fixed the northern and southern points of its course but has also drawn a line to indicate the dividing boundary between the two States, it is not open to us now, even if there is a mistake, to go beyond his award, and modify or rectify it.

4. The case for Pakistan that the river Mathabhanga takes off from the Ganges near the village of Godagaridiar and flows southwards through certain mauzas and thanas till it reaches the boundary between Daulatpur and Karimpur has not been made out from the documents filed on either side. At the best, the village and thak maps taken individually and pieced together take us a little to the north of Jalangi so far as a river course is concerned; but it is not the Mathabhanga as is claimed; it may be the Jalangi or some tributary for aught we know. It is seen from the Survey Map of 1854 and the annual River Reports produced by Pakistan (Docts. 140 to 150) that the Mathabhanga has been as eccentric and changeful as her mother the river Ganges and it is not possible to determine her course with any exactitude for any length of time.

5. The learned Advocate General of West Bengal was asked by us to state where according to him is the river Mathabhanga and where it takes off from the river Ganges. He was not able to give a definite answer and suggest anyting constructive about his own case. He however conceded that according to the documents that were available to him and placed before the Tribunal the river does not take off from the point shown by Sir Cyril in his map and that the course of the river indicated by him may be taken to be wrong. But he urged that this did not conclude the case against India and that we were bound even by the wrong assumption on a question of fact by Sir Cyril, the arbitrator.

6. The position then is this. Pakistan is not correct in describing the course of the Mathabhanga river and in stating that it takes off from the Ganges near Godagaridiar. India is not able definitely to locate or delineate the course of the river, though it has many theories and suggestions as to what it might be, all of which put together do more to destroy the case for Pakistan than to build up an affirmative case for India. It is conceded that Sir Cyril's Mathabhanga is wrong and that as a matter of fact no river with such a name takes off from the Ganges at the point indicated by him. It seems to me that Sir

Cyril's Mathabhanga is some old course of the river which he got from some of the numerous maps that must have been placed before him.

7. A doubt may arise if Sir Cyril's position was that of an arbitrator and if his pronouncement can be said to be an award as the two rival parties did not select him to decide any competing claims as between themselves. But such a doubt can only be a passing one. It is not necessary that the parties should have conflicting claims based on antecedent rights, alleged or real, nor is it essential that the person to decide between them should be chosen by them. Any two persons may agree that a third man to be chosen by an independent party should effect a division between them of properties and if that third man is not functioning as a judge in a court of law created or erected by the constitution subject to all the limitations of strict procedure, rules of evidence, appeal and revision, he is really an arbitrator, nothing more, nothing less.

8. It should be remembered that we are not sitting as a court of appeal or revision against Sir Cyril Radcliffe's Award. Our powers are very limited. We cannot remit the award for reconsideration or rectification. It is true that clerical errors and mistakes in an award can be set right and mistakes appearing on the face of the award can also be rectified by the arbitrator being asked to reconsider what he has done. But no such jurisdiction has been conferred on us under the terms of the Delhi agreement. All that we have to do is only to interpret his award and ascertain the common boundary as indicated by him. It cannot be said that Sir Cyril Radcliffe had no jurisdiction in assuming that a particular watercourse represented the Mathabhanga river and that it took off from the Ganges at a particular point. He might have been wrong in his assumptions. He has not only done so in the present case but has delineated the boundary line in a particular manner joining the northern point on the river Ganges with the southern point on the boundary between the thanas of Daulatpur and Karimpur. He has indicated this portion as the Mathabhanga and he did so notwithstanding the fact that he had before his eyes the map with the words "Mathabhanga R." at the dead end of the river to the west suggesting that the river had probably a different course. Can we under these circumstances substitute for Sir Cyril's Mathabhanga line the real Mathabhanga course, assuming that we are now able to ascertain it with precision and say that the latter shall constitute the boundary line of these two States? Such a power would be regarded as extraordinary EVEN FOR A COURT OF APPEAL OR REVISION. Even then, the award would have to be remitted to the arbitrator for reconsideration.

9. Two passages only need be quoted from the leading text-book on Arbitration and Award by Russel (twelfth edition) to illustrate the very restricted nature of this jurisdiction. One passage is on page 177:

> "Where an arbitrator makes a mistake either in law or in fact in determining the matters referred, but such mistake does not appear on the face of the award, the award is good notwithstanding the mistake, and will not be remitted".

The other is at page 179:

> "The decision to which the arbitrator really comes, as soon as he expresses it in his award, is final both as to law and fact. No decision, therefore, at which he arrived, if properly expressed in the award, can be a mistake or affect the finality of his award on that ground".

In the case of *In re Great Western Rail Co.*, and the *Postmaster General*, 19 Time L. Reports 136, where the figures on which the award had been based had been misapprehended and misunderstood, the award was still held binding. The decision in *Bland* v. *Russian Bank for Foreign Trade* (1960), 11 Com. Cas. 71, shows the extreme extent to which the courts have attached finality to the awards of the arbitrators. "An agreement provided for the reference of disputes to arbitration on the 'basis of Riga usance'. The arbitrator made an award which was regular on the face of it, but he had not the agreement for reference before him at the time of the arbitration and he had never heard of Riga usance, to which he had no regard in making his award. Held that it must be presumed in

the absence of evidence to the contrary, that the award was in accordance with Riga usance."

10. Mr. Page urged that this was a case of divergence between the boundary as described in Annexure "A" and as delineated on the map Annexure "B" and that consequently according to paragraph 10 of the Report of Sir Cyril, the description in Annexure "A" should prevail. As a matter of fact, however, there is no such divergence as is contemplated in the said paragraph. The boundary as described in Annexure "A" and as delineated on the map in Annexure "B" correspond with each other. What is defective or wrong is the assumption by Sir Cyril that the Mathahanga river took off from the Ganges at the particular point mentioned by him. Both Annexures A and B proceed on this mistaken assumption, but there is no disagreement between them *inter se*. The mistake or error relied on is not apparent on the face of the award. It is to be inferred from a number of extraneous circumstances revealed by village maps an annual river reports, etc. Such a mistake is incapable of correction even by a court invested with jurisdiction by way of appeal or revision. Much less have we, sitting as a Tribunal under the specific agreement conferring on us very limited powers, any authority to interfere.

11. If Sir Cyril had merely stated that the boundary shall run from the point where the Mathabhanga takes off from the Ganges and to the point where it joins the boundary between the two thanas of Daulatpur and Karimpur, it may have been possible for us to interpret what he meant and give effect to his meaning by ascertaining as best as we can the course of the river between these two points as it existed on the date of the award. But he has gone further and drawn the boundary line between the two points imagining it to be along the course of the river Mathabhanga as he thought it was. The mistake is not one which can be said to vitiate the award and justify its rescission. To borrow the language of Lord Justice Vaghan Williams in *Re Baxters and the Midland Rail Co.* (1906), L.T. at page 22, "the Court would not remit an award to the arbitrator on the ground of a mistake by him if the mistake which is relied upon is one which involves an impeachment by him of a matter upon which he has made an adjudication". It appears to me that we are bound by Sir Cyril's map and his boundary line.

12. As the geographical features stand at present, and stood on the date of the award, presumably there is no point on the river Ganges from which the river Mathabhanga takes off. Had there been such a point, it was possible perhaps to argue that that point should be taken to be the starting point though in the description of the point and in the map, Sir Cyril indicated a different point. In the absence of such a point corresponding with natural features, we have to accept Sir Cyril's point. The alternative of non-acceptance of the same leads to the consequence that the award has to be given up altogether as entirely meaningless so far as this particular boundary line is concerned. Mr. Page was good enough to concede in the course of his arguments, though his learned junior, the Advocate General of East Bengal, was not prepared to do so, that for all practical purposes the two points mentioned by Sir Cyril—the point on the river Ganges and the point where the Mathabhanga meets the boundary of the two thanas—may be taken as rigid or fixed points. On this basis, the boundary line drawn by Sir Cyril should govern us. Its mention as starting from the point where the river Mathabhanga takes off from the Ganges has to be regarded as an unessential, descriptive detail, a mistake in the statement of which cannot go to the root of the matter. This rule is embodied in Section 97 of the Indian Evidence Act, and is found in Brown's Legal Maxims (9th edition, page 403) in this form: —"where the description is made up of more than one part, and one part is true but the other false, there, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise".

13. The way in which the Delhi agreement is worded on this dispute appears to assume the correctness of the two points and seems only to raise the question what kind of a boundary it is—fluid or rigid. But I do not wish to be too technical on such a vital matter.

14. If however it is held that it is open to us now to find out which exactly is the Mathabhanga river and substitute the same as the boundary between the two States in

place of the Mathabhanga of Sir Cyril, we shall have to examine the available materials, in the shape of maps primarily, to see if we could find out the real Mathabhanga. I have already pointed out that the contention of Pakistan that the evidence establishes the fact that the river takes off somewhere to the north of Jalangi near or at the village of Godagaridiar or Dyrampur is really untenable. Apart from the earlier maps already referred to, the aerial maps of 1939 and 1948 (Documents Nos. 176 and 177 and 151 to 154 and 164) show clearly that the river takes off from the loop of the Ganges a little to the south-east of the Jalangi village. It is only the river commencing from this loop that can be taken as the real Mathabhanga. The boundary will then run from this offtake of the river to the northernmost point where it meets the boundary between the thanas of Daulatpur and Karimpur. As the boundary line must be a continuous one, we must connect the northern point mentioned by Sir Cyril and shown in his map with the offtake point of the river as now determined.

15. Where this boundary is a fluid line or a rigid one arises here also. For the reasons given by me already under Dispute No. I, which I do not wish to repeat, I hold that it is a rigid line along the middle line of the main channel of the river. The demarcation will have to be made accordingly with reference to the conditions prevalent on the date of the report, because the actual course of the river was not ruled out by Sir Cyril.

16. But as stated under Dispute No. I; if the experts of the two Dominions come to the conclusion that such a determination of the boundary will not be possible owing to the lapse of more than two years from the date of the award, we have no other alternative but to determine the middle line of the course of the river as it runs today.

17. The line has to be demarcated in execution proceedings as contemplated in paragraph 3, sub-clause (3) of the Delhi agreement.

18. The offtake point of the river as now determined shall be connected by a shortest straight line with the point nearest to it on the midstream of the main channel of the river Ganges.

N. CHANDRASEKHARA AIYAR.

APPENDIX V

Opinion of the Hon'ble Mr. Justice Shahabuddin on Dispute No. II

The boundary line concerned in this dispute is described in the concluding portion of the first sentence of paragraph 5 and in the whole of paragraph 6 of Annexure A to the Radcliffe Award. According to this description the boundary line in this case starts from the point in the north-western corner of Nadia district, where the river Mathabhanga takes off from the river Ganges and proceeds along the river Mathabhanga to the northernmost point, where that river meets the boundary between the thanas of Daulatpur and Karimpur. The last sentence in paragraph 6 is "The middle line of the main channel shall constitute the actual boundary".

The case for Pakistan is as follows: —

The boundary so described is a river boundary and Sir Cyril by this description intended the river Mathabhanga to be the boundary. Along the line delineated on the map (Annexure B) as the course of the river Mathabhanga, there was in fact no river flowing at any time. On the other hand, the river Mathabhanga before and at the date of the award took off, and at the present time takes off from the river Ganges near the village Godagaridiar, and flowed and still flows southwards as described in paragraph 2 of Pakistan's Statement of Case, and as shown in the Air Survey Map of 1948 filed by Pakistan. The delineation on the map is, therefore, clearly divergent from the description of the boundary and has consequently to be ignored.

On behalf of India, it is not disputed that there was no river flowing along the line marked on the award map as the course of the river Mathabhanga. But it is contended that

the river Mathabhanga did not, at the time of the award, even according to the air photograph map relied on by Pakistan, flow along the course that is now claimed for it by Pakistan. It is said that even according to the said air map the river takes off from the loop of the Ganges at Jalangi inside the district of Murshidabad, and that this river therefore does not conform to the description of the boundary. The Case for India is that in these circumstances what has been delineated by Sir Cyril must prevail, as he was an Arbitrator and his decision that the river Mathabhanga was flowing along the course indicated by him on the map cannot be questioned even if it be wrong. According to India, there is no divergence between the map and the description, and the boundary must therefore be a rigid boundary and it should be demarcated as per the delineation on the map.

Taking the entire description of the boundary concerned in this dispute along with the description of the boundary in the first dispute, and having regard to the fact that these two boundaries form a continuous boundary, the conclusion that the dominant idea in this description was to have a fluid boundary, appears to be irresistable. It is not necessary to repeat here the reasons, which I have already stated in my opinion on the first dispute, for my conclusion that the boundary in that case was intended by Sir Cyril to be a fluid boundary and not a rigid one. The boundary line being a continuous one and there being no ostensible reason for Sir Cyril to distinguish between the two cases when he was deciding to make the line run along the course of the river, it is only reasonable to infer that he intended the boundary in this case also to be fluid and not rigid.

The description in paragraph 6 with which we are directly concerned in this case by itself indicates that Sir Cyril intended the river Mathabhanga to be the boundary. The last sentence in that paragraph to which reference has already been made *i.e.*, "the middle line of the main channel shall constitute the actual boundary" indicates this clearly. Both the points of this boundary line *i.e.*, the point of the off-take as well as the point where the river cuts the thana boundary are, in my opinion, flexible points. It is seen from the Report of the River Engineers that the off-take has been oscillating from time to time (Document No. 146). Similarly, the other point is also subject to changes as the Mathabhanga, like its parent the Ganges, is erratic. It is no doubt true that in paragraph 5, as has already been indicated, the point of the off-take is mentioned as a point in the north-western corner of the district of Nadia, but that is only an indication of a direction and does not form an integral or essential part of the description. The indication there is of an area which was considered by Sir Cyril as the probable area within which the Mathabhanga was likely to take off from the river Ganges from time to time. He did not intend to fix any particular point of off-take or any particular area in which the river was to take off from the Ganges. The fact that the delineation on the map with regard to this river is admittedly of a course where no river was flowing indicates that Sir Cyril had an incorrect impression as to the exact course of the river Mathabhanga; but there can no doubt that he intended the river Mathabhanga to be the boundary. In the circumstances, the direction with regard to the area in which the river is likely to take off cannot be construed as restricting the dominant intention of making this boundary flexible.

There was good reason for Sir Cyril to decide upon a flexible boundary in this area as the river Mathabhanga is one of the rivers that ultimately feed the Bhagirathi, the importance of which to Calcutta was clearly realised by him. He had decided to give Calcutta to West Bengal and so he must naturally have also intended to keep this river as the boundary between the two States close to its source, so that this stretch on the river may not completely pass out of the control of the West Bengal Province. It is seen from the air photograph map (Document No. 151), the accuracy of which has not been questioned by India, that the Mathabhanga in the early part of its course gets silted and dried up at several points. This is also clear from the Report of the River Engineers (Document No. 137). It is therefore extremely unlikely that Sir Cyril would ever have favoured a rigid boundary line which would clearly open up the possibility of the head-waters of the Mathabhanga actually flowing inside the territory East Bengal. If Sir Cyril's idea had been to adopt a fixed boundary he would have selected the thana boundary from the starting point itself.

In these circumstances, the delineation on the map is clearly divergent from the description, as the delineation is not of any river but of an imaginary line. It does not seem necessary to discuss in this case whether an Arbitrator's decision has to be regarded as final even if it is based on a mistake of fact which goes to the root of the matter, for, Sir Cyril, in his award, has himself made it clear that the map is only an illustration of the boundary described and that in case of a divergence between it and the description, the latter should prevail. If the delineation in this case is preferred, it would amount to a complete disregard of his directions.

As regards the point of the off-take of the Mathabhanga the aerial photograph map of 1948 shows a channel flowing from Godagaridiar downwards which appears to be one of the loops of the river Ganges and it is also seen from the Report of the River Engineers that in some of the past years the Mathabhanga was flowing from the Ganges through this channel. There is in my opinion considerable force in the contention for Pakistan that this channel, though it forms part of the loop of the Ganges has been treated as part of the Mathabhanga itself. In this connection, the fact that reference in the description of the point of off-take is to the channel of the river Mathabhanga and not to the river Mathabhanga appears to be rather significant. However, even if the channel is regarded as distinct from the Mathabhanga and it is considered that the off-take was at the time of the award at the point mentioned by India *i.e.*, near Jalangi in Murshidabad, it cannot be said that there is no river in existence which conforms to the description. As stated already, the words "in the north-western corner of Nadia" are not a material part of the description and the off-take according to 1948 Air Survey maps is not at Jalangi itself but is almost on the north-western border of Nadia district. There is therefore a river called Mathabhanga which substantially accords with the description given by Sir Cyril.

Even if it is held that the Mathabhanga took off at Jalangi, the boundary line, which for reasons I have already stated has to be regarded as flexible, has got to pass through the channel, whether it is taken as a part of the Ganges or as a part of the river Mathabhanga. This will have to be so, even if the boundary is made rigid boundary, because, according to the description in paragraphs 5 and 6 of the annexure to the award the line is intended to be drawn from a point on the midstream of the Ganges to the off-take of the river Mathabhanga, not over land, but through this very loop of the Ganges. After all, the Mathabhanga is fed by the waters of the Ganges and I can see no objection to treating the loop through which it is fed as the channel of the Mathabhanga for all practical purposes.

I am, therefore, of the opinion that the boundary line in this case is a fluid boundary and not a rigid one, and that it should run on water along the course described in the Statement of the Case of Pakistan, subject only to such geographical variations as may result from changes occurring in the course of the river Mathabhanga.

M. SHAHABUDDIN.

APPENDIX VI

The opinion of the Chairman on Dispute No. II

The case submitted in this dispute on behalf of the Government of Pakistan is that the middle line of the channel of the river Mathabhanga within the limits prescribed in (II) 2 in the printed statement of the case of the Government of Pakistan is and is to remain the boundary between India and Pakistan, subject only to such geographical variations as may result from changes occurring in the course of the river Mathabhanga. The limits thus prescribed are as follows:

> "At and before the date of the said Award, the Mathabhanga River took off and now takes off from the Ganges near village Godagaridiar J.L. No. 170 of Daulatpur P.S. and flowed as it now flows through mauzas Udainagar Khanda, J.L. No. 169 and Muradpur Diar J.L. No. 172 of Daulatpur P.S., Muradpur Jalangi J.L. No. 30, Sahebrampur J.L. No. 33, Ikuri. J.L. No. 31 of Jalangi P.S. of Murshidabad district, and mauza Madhugari J.L. No. 108 of Karimpur P.S., meeting the boundary between

thanas Daulatpur and Karimpur near the south-western corner of Char Sarkarpara J.L. No. 173 of Daulatpur P.S."

The case submitted on behalf of the Government of India is that the point in the north-western corner of the district of Nadia where the channel of the river Mathabhanga takes off from the river Ganges can be ascertained by reference to Annexure B of Sir Cyril Radcliffe's Award, *i.e.*, his map, where he has shown the point at which the channel of the Mathabhanga takes off from the river Ganges. The other end of the dispute boundary is the northernmost point where the channel of the Mathabhanga meets the boundary between the thanas of Daulatpur and Karimpur. Having taken that point Sir Cyril has drawn the line from there up to the point where the river Mathabhanga according to his award, takes off from the river Ganges. The Government of India claims the land to the west of the line in Annexure B.

The relevant portion of the Annexure A of the award is as follows: —

"5. . . . to the point in the north-western corner of the District of Nadia where the channel of the River Mathabhanga takes off from the River Ganges. The district boundaries, and not the actual course of the River Ganges, shall constitute the boundary between East and West Bengal.

"6. From the point on the River Ganges where the channel of the River Mathabhanga takes off, the line shall run along that channel to the northernmost point where it meets the boundary between the thanas of Daulatpur and Karimpur. The middle line of the main channel shall constitute the actual boundary.

"7. From this point the boundary between East and West Bengal shall run along the boundary between the thanas of Daulatpur and Karimpur; . . .".

It is common ground that there is no dispute as to the boundary proceeding southwards from the point where the channel of the Mathabhanga meets the boundary between the thanas of Daulatpur and Karimpur.

The Government of India does not base their case on the presumption that there is, or was, at or about the time when Sir Cyril gave his award, a river Mathabhanga taking off from the river Ganges as indicated on the map attached to the award. They concede that there is no river at that place. They say that—river or no river—there is a rigid line as indicated on the map from the point where, according to the map, the river Mathabhanga takes off from the river Ganges and that the line which is to be followed at the demarcation is, so far as there is a main channel indicated on the map, the line which is equal in distance from both the shores as indicated on the map, and then the line representing the river until this line meets the northernmost point on the boundary between the thanas of Daulatpur and Karimpur.

The Government of Pakistan submit that there is a divergence between the boundary as described in Annexure A of the award and as delineated in the map in Annexure B thereof, in that, the position of the off-take and the channel of the river Mathabhanga as shown in the map is incorrect, and that, in accordance with the terms of paragraph 10 of the award, the description in Annexure A thereof must prevail.

The Government of India in this respect refers to what is said in clause 10 in the award: "The demarcation of the boundary line is described in detail in the schedule which forms Annexure A to this award and in the map attached thereto, Annexure B". The Government of India says: The demarcation is described in detail in the map as also in Annexure A. Therefore, the description is in detail in both. The map is not only for the purpose of illustration, but the demarcation of the boundary line is described in detail in the map. Sir Cyril's finding on a question of fact is conclusive. He finds the Mathabhanga channel and draws it on the map. There is no divergence between the boundary line in Annexure B and the description in Annexure A.

The Government of Pakistan replies: You must interpret a term in connection with its context. The map is annexed for purposes of illustration, and if there should be any divergence between the boundary as described in Annexure A and as delineated on the

map in Annexure B, the description in Annexure A is to prevail. In this case the author of the award has done two things: he has made a delineation and he has also made a description. Delineation is the marking of a red line. His delineation is quite obviously divergent from the description given in Annexure A.

I am of the opinion that it must be held that the award makes a difference between the description in Annexure A and the delineation on the map Annexure B. So far as it is possible to get a solution from the description in Annexure A the delineation on the map is only an illustration of that solution.

In this case such a solution can be found. According to the description in Annexure A Section 5 the line now in dispute shall begin at a point in the north-western corner of the district of Nadia where the channel of the river Mathabhanga takes off from the river Ganges. From that point the line shall run along the channel to the northernmost point where it meets the boundary between the thanas of Daulatpur and Karimpur.

Air photograph maps established by way of photographs taken from the air in the year 1948 and submitted by the Government of Pakistan (Document No. 164) and an air map of 1939 submitted by the Government of India which is substantially the same as the 1948 air photograph maps, are showing a river taking off from a loop of the river Ganges not far from the point indicated on the Annexure B map. This same river is running south to the northernmost point where it meets the boundary between the thanas aforementioned.

There is no reason why this river should not be accepted as the river described in Annexure A.

The river, as reproduced on the 1948 air photograph maps (Document No. 164), corresponds with the description in Annexure A, with the exception that the place where this river takes off from the river Ganges possibly is situated in the district of Murshidabad, but anyhow quite close to the north-western corner of the District of Nadia. If there is such a difference this cannot however be considered as being of any importance. The river thus flowing must in consequence be taken as being the river Mathabhanga to which the description in Annexure A of the award refers.

The award, Annexure A, says that the boundary line shall be a line running along the channel of the river Mathabhanga and that the middle line of the main channel shall constitute the actual boundary.

The Annexure A must by that mean an existing river. The river with a channel as traced on the Annexure B map in reality does not exist.

The Government of India, however, has contended that the fact that a river with a channel, which takes off from the river Ganges drawn on the Annexure B map, must, even though there is no river at that place, be deemed a reality, the correctness of which cannot be challenged.

This would mean that where there is a divergence between what the description means, in this case an existing river, and what the map indicates *viz.*, a river existing though the river does in fact not exist, the map should prevail. This cannot be the meaning of the award.

To accept the line delineated on the Annexure B map as the boundary line would also mean to give this delineation of a line on the map the force of a description as mentioned in Annexure A. Nor would this be in conformity with the award as long as there is a description which is sufficient to give the necessary solution.

The contention of the Government of India that the point in the north-western corner of the district of Nadia where the channel of the river Mathabhanga takes off from the river Ganges can be ascertained by reference to the Annexure B map can therefore not be accepted.

According to my opinion the beginning of the boundary line shall therefore be the point in or close to the north-western corner of the district of Nadia where the channel of this river takes off from the river Ganges.

There has been some difference of opinion concerning the place where the off-take of the river Mathabhanga is situated. According to my opinion the river Mathabhanga must be held to take off from a loop which forms a part of the river Ganges. This off-take is situated west-south-west of the police station and the camping ground of Jalangi village as these are shown on the air photograph map (Document No. 164). The river Mathabhanga then flows from that off-take southwards to the northernmost point where it meets the boundary between the thanas of Daulatpur and Karimpur.

There is not, as in Dispute I, any expression in the award indicating that the boundary line should not follow the line of a flowing stream, with, as is said in the printed statement of the case of Pakistan, such geographical variations of that stream as may result from changes occurring in the course of the river.

There is of course the fact that in the description of the award the channel of the river Mathabhanga is mentioned as taking off from a point in the north-western corner of the district of Nadia. But the purpose of mentioning the area from which the river is flowing should be taken as being made more for an identifying purpose than for establishing any fixed point of off-take.

The boundary line in question shall therefore follow not a rigid line from the off-take of the river Mathabhanga but the middle line of the main channel as it is flowing, down to the northernmost point where the channel meets the boundary between the thanas of Daulatpur and Karimpur.

The boundary line running along the boundaries between the districts of Rajshahi and Murshidabad and the districts of Rajshahi and Nadia must be connected with the boundary line beginning where the channel of the river Mathabhanga takes off from the river Ganges. The whole boundary line must of course be continuous. A connecting boundary line must therefore be drawn from the boundary line going along the district boundaries aforementioned, to the beginning of the boundary line formed by the middle line of the main channel of the river Mathabhanga beginning at the off-take of the river Mathabhanga as described.

This connecting boundary line must follow the shortest way from the beginning of the middle line of the main channel of the river Mathabhanga to the boundary line between the districts of Rajshahi and Nadia.

My conclusion is therefore that the boundary between India and Pakistan shall run along the middle line of the main channel of the river Mathabhanga which takes off from the river Ganges in or close to the north-western corner of the district of Nadia at a point west-south-west of the police station and the camping ground of the village of Jalangi as they are shown on the air photograph map of 1948, and then flows southwards to the northernmost point of the boundary between the thanas of Daulatpur and Karimpur.

The point of the off-take of the river Mathabhanga shall be connected by a straight and shortest line with a point in the midstream of the main channel of the river Ganges, the said latter point being ascertained as on the date of the award or if not possible as on the date of the demarcation of the boundary line in Dispute I. The said point so ascertained shall be the south-easternmost point of the boundary line in Dispute I, this point being a fixed point.

Algot BAGGE.

APPENDIX VII

Opinion of the Hon'ble Mr. Justice N. Chandrasekhara Aiyar on Dispute No. III

This relates to the claim made by the contending States to the Patharia Hill Reserve Forest, which is shown in the coloured index map filed on the side of India (Doc. 185). Part of it is thana Kulaura (No. 5), but with this we are not concerned. Another part to the north indicated by the letter "B" and in thana Karimganj (marked I) is also beyond the scope of the present dispute. It has become a disforested area. We are concerned only with the white portion of the forest in thana Barlekha (No. 3) and the blue portion in thana Patharkandi (No. 4).

2. Thana Beani Bazar (No. 2) and thana Barlekha (No. 3) were originally one thana Jaldhup. The boundaries of thana Jaldhup are found in the notification of the 1st July 1880 (Doc. 200). The eastern boundary is the important one for our present purposes. This thana Jaldhup was split up into two thanas Beani Bazar and Barlekha by notification No. 5133-H, dated the 28th May 1940 (Doc. 204) and published in the Assam Gazette dated the 5th June 1940, Part II, page 991. The preliminary notification was No. 6214-H dated the 2nd September 1938 (Doc. 203) published in the Assam Gazette dated the 7th September 1938, page 1203.

3. Patharkandi was a police outpost till 1922 when it became a thana according to a notification dated the 10th January 1922 (Doc. 202).

4. The forest in question was declared to be a reserve forest with effect from the 15th May 1920 under section 17 of the Assam Forest Regulation 1891. The notification is No. 3698F of the 27th April 1920 (Doc. 201). The approximate area is given as 27,600 acres and the boundaries on all the four sides are mentioned in detail.

5. In making his award, Sir Cyril used the Sylhet district map signed by Mr. Creed, Superintendent of Assam Surveys, on the 22nd April 1937 (Doc. 184). It would be seen that it is the right-hand side portion of a fuller map. The full map has been filed by Pakistan (Doc. 256). It is said that a copy of it printed in 1947 and containing some minor alterations was actually before Sir Cyril.

6. In paragraph 13 of his report, Sir Cyril said—

"Accordingly I decide an award as follows—

> "A line shall be drawn from the point where the boundary between the thanas of Patharkandi and Kulaura meets the frontier of Tripura State and shall run north along the boundary between these thanas, then along the boundary between the thanas of Patharkandi and Barlekha, then along the boundary between the thanas of Karimganj and Barlekha, and then along the boundary between the thanas of Karimganj and Beani Bazar to the point where the boundary meets the river Kusiyara."

This is the red line in the map used by Sir Cyril and it would be seen that the line cuts across the Patharia Hill Forest leaving the white and the pink portions in the index map to the west of it and the remainder to the east of it.

7. Another sentence in paragraph 13 of the report is also relevant and important. It is this—

> "So much of the district of Sylhet as lies to the west and north of this line shall be detached from the Province of Assam and transferred to the Province of East Bengal. No other part of the Province of Assam shall be transferred."

("North of this line" is the Kusiyara line involved in the next dispute.)

8. The case for India is that the whole of the forest, the white portion inclusive, belongs to them under the award inasmuch as the Barlekha notification of 1940 expressly excluded the forest from the Barlekha limits in giving the eastern boundary and that consequently the whole area forms part and parcel of Patharkandi, even though there was

no fresh notification or order including it in that thana. It is urged by them that in any event dominion of Pakistan can have no right or claim to the blue portion as it is to the east of the boundary line drawn by Sir Cyril who has taken special care to say that only so much of the district of Sylhet as lies to the west of this line shall go to East Bengal and that no other part of the Province of Assam shall be transferred.

9. The case for Pakistan is, on the other hand, that the whole area belongs to them. Their contention is that the notification of 1940 excluding the forest from the limits of Barlekha was based upon some error, confusion or mistake, that the notification itself was illegal or void, that it was never acted upon, and that despite its existence Barkekha exercised jurisdiction over the forest. In any event it is contended that they should get the white portion at least on the basis of Sir Cyril's Award.

10. It is true that Sir Cyril made a mistake in thinking that the thanas of Patharkandi and Barlekha had a common boundary line between them. As a matter of fact, there was no such boundary line. According to the 1940 notification the Patharia Hill Forest was the eastern boundary of Barlekha. The western boundary of Patharkandi thana as given in the 1922 notification was—

"Mauzas Sheoratali, Gramtala, Kechrigul, Dakingul, Barkhala in thana Jaldhup; Patharia Hills in thanas Jaldhup and Hingajiya; and Hill Tippera".

11. The 1937 map which he had before him or its reprint or copy of 1947, apparently misled him into thinking that there was a common boundary line, while there was none in reality. This mistake on his part has given rise to the present trouble and the rival claims on behalf of India and Pakistan.

12. It would be seen from a comparison of the map of 1937 used by Sir Cyril and the map of the district of Sylhet alleged to have been prepared in 1947 for Sir Cyril's use in connection with his award that the red line he has drawn from south to north proceeds up to a particular distance on the subdivision boundary line, and on the forest boundary line from that point till we reach the extreme north-western limit of the forest (inclusive of bloc B). This north-western limit is a little to the south-east of latu and north-west of 222 with a triangle to its side. Sir Cyril assumed, for some reason not known to us, that this was the common boundary line between the two thanas of Barlekha and Patharkandi.

13. Certain facts are incontrovertible. The Patharia Hill Reserve Forest after it was constituted as such under the Forest notification of 1920 was comprised within four areas—Jaldhup, Karimganj, Patharkandi and Kulaura. This is made clear not only by the village boundaries of Jaldhup and Karimganj given in the first notification of 1880 (Doc. 200) but also by the Forest notification and the notification of 1922 where we find the Patharia Hills mentioned in Patharkandi, Jaldhup and Karimganj. This is also apparent from the Karimganj thana map filed on India's side (Doc. 184), where reference is made near the south-western corner to the Patharia Hills Reserve Forest within the thana limits and to the Patharia Hills Reserve Forest within thana Patharkandi limits. The Patharkandi outpost map (Doc. 189)—T-4—on India's side shows a part of the Patharia Hills within the boundary of that outpost and to the east of thanas Kulaura and Jaldhup. The Jaldhup thana map Ex. T-7 (Doc. 192) leads to the same result, if we have regard to the village boundaries given in the 1880 notification. A part of the Patharia Hills is within Jaldhup and there is a part to the east of it in the Patharkandi outpost. It may be taken as clear therefore that the reserve forest was comprised within the several thanas aforesaid. When Jaldhup thana was subdivided into two—*viz.*, Beani Bazar and Barlekha—the eastern boundary of Barlekha was mentioned as the western boundary of the Patharia Hills Reserve Forest. This undoubtedly excludes the forest from Barlekha thana limits. It was admitted on the side of India that there was no corresponding inclusion of the forest area in the Patharkandi thana limits, but it was contended for that Dominion that as the forest lies between the two thanas it must belong to Patharkandi if it did not belong to Barlekha. The learned Advocate General of East Pakistan conceded that the forest must belong either to one or to the other of the two thanas.

14. What is important to remember is that at no time was the Patharia Hill or the reserve forest going by that name entirely within the jurisdiction of Jaldhup so that it could be said that when Barlekha thana was created it passed over into its jurisdiction. On the other hand, we find from the two express notifications of 1938 and 1940, the latter one based upon the former, that the Patharkandi Hill Forest was excluded from Barlekha.

15. The Dominion of Pakistan had consequently an uphill task to show how the entire forest could be said to belong to them. This was sought to be established on several lines of reasoning. The main argument was that the notifications of 1938 and 1940 excluding the forest from the Barlekha thana altogether were based on error and that the notifications were illegal in themselves. The second line of reasoning was that they had been exercising jurisdiction over the forest by way of police proceedings, census operations and registration of pedal cycles under the Defence of India Rules. It was lastly pointed out that the circle map of Patharkandi (Doc. 243) referred to the forest as beyond the circle limits to the west and north-west.

16. It is somewhat difficult to follow the argument that the notifications were illegal. It may be that there are rules to the effect that when an area is proposed to be transferred from one thana to another the officers concerned with the proposal should specify the area clearly, the reasons suggested for the transfer and the new station to which it is proposed to be transferred. Such rules are for the superior officers to make up their mind whether the transfer suggested is reasonable and should be made. The fact that there is an omission to specify the area may be a reason for returning the papers for the supply of the omission or for reprimand of the officer or officers concerned, but to say that because of the omission the notification of the Governor-in-Council is itself invalid or of no legal effect, is to say something which is wholly unacceptable and unsound. The Governor-in-Council has absolute powers to alter the limits of thanas, extinguish old thanas, and bring into existence new ones; and once we have a notification published in the Gazette, it is valid and binding until it is altered, modified, or set aside legally, by a fresh notification or other process laid down by law. It is a well-known principle of law that minor irregularities of procedure do not affect jurisdiction. The contention that the notification remained a dead letter and that the subordinate officers in the district—revenue, police or the census departments—acted on the footing that there was no such notification but treated the forest as within Barlekha limits, cannot, even if it be true on the facts, adversely affect the validity or legality of the notifications.

17. It may be that Barlekha police registered crime cases of the village called Patharia Test or the sannyasi settlement named Madhabkund—both of them alleged to be within the forest limits; it may also be that the census operations relating to those living in the forest were done by the Barlekha officials; but these are insignificant factors in themselves and are all of no avail in the face of the notification. So is the circumstance that under the Defence of India Rules some three or four cycles of Patharia Test were registered at the Barlekha police station. The maps would show that the Patharia Test is very near, if not almost on, the western border of the forest and there need be no surprise if Barlekha thought that it had jurisdiction over it notwithstanding the notification of 1940. It takes time for such notifications to filtrate to the subordinate officers in out-of-the-way stations, not to speak of the public, and there is nothing strange if the old state of affairs was continued as correct. Exercise of jurisdiction over a particular locality in a big forest area does not mean assumption of jurisdiction over the whole forest, much less would it be a case of possession.

18. Then we have the Patharkandi circle map (Doc. 243). The circle map is admittedly a map prepared for revenue purposes and sometimes comprises several thanas or parts of thanas. Its evidentiary value on a question like the one we have before us for decision is practically nil.

19. The resulting position is a simple one, rather. The forest was constituted a reserve forest with effect from the 15th May 1920, and according to the notification of 1922 there were Patharia Hills to the east of Jaldhup in the Patharkandi thana and Patharia Hills to the west of Patharkandi in the Jaldhup area. It is fairly apparent that the reserve

forest in Jaldhup represents the white portion and the reserve forest in Patharkandi represents the blue portion in the index map filed on the side of India. The 1940 notification removes the white portion altogether from Barlekha but does not say that it must go to Patharkandi. This, however, does not matter. Even Mr. Faiz Ali had to admit in the course of his arguments that if any portion of it did not belong to Barlekha, it must go to Patharkandi.

20. The claim of Pakistan to any portion east of the boundary line drawn by Sir Cyril is on the face of it unsustainable, as he had expressly said that it is only so much of the district of Sylhet as lies to the west of this line shall be transferred to the Province of East Bengal and no other part of the Province of Assam shall be transferred.

21. However untenable the case of Pakistan is even as regards the white portion of the forest, the fact still remains that Sir Cyril drew his line, which he thought mistakenly was the eastern boundary line of Barlekha, so as to include the said area within Pakistan territory. The line cuts the forest into two from south to north, and the white portion is to the west of his line. He says in so many words that all area which is to the west of the line shall go to Pakistan. With the map annexure "B" before him, there can be no doubt that he was aware that he was giving away a portion of the forest, *viz.*, the white portion, to Pakistan. The mistake in describing the line as the boundary between Barlekha and Patharkandi need not stand in the way of his intention being carried out. I would, therefore, award the white bit of the forest—by the "white bit" I mean what is shown as such in the index map filed on the side of India—to Pakistan. The actual division shall be carried out accordingly.

N. CHANDRASEKHARA AIYAR.

APPENDIX VIII

Opinion of the Hon'ble Mr. Justice Shahabuddin on Dispute No. III

This dispute relates to a major portion of the Patharia Hills Reserve Forest. The following facts, for the sake of convenience, may be stated before setting out the contentions on both sides.

This forest, when it was constituted in 1920, comprised portions of Kulaura and Jaldhup thanas and of a portion of the old Karimganj thana. There is no dispute about the portion of the forest in Kulaura thana which is in East Bengal; nor is there any dispute about the south-west portion of the forest lying in the present Karimganj thana. Prior to the constitution of this forest, the area now in dispute fell partly in Jaldhup thana and partly in the old Karimganj thana, and the boundary line between those two thanas as defined in the notification of 1880 ran across the southern half of the forest. According to this boundary line a portion in dispute fell in the Jaldhup thana and the rest in the old Karimganj thana. In 1922 Patharkandi outpost of the old Karimganj thana was made into a thana and in this connection the boundaries of all the thanas in Sylhet district were notified. In the description of the boundaries of thana Jaldhup and the new Patharkandi thana no mention was made of the reserve forest, but it was stated that the western boundary of Patharkandi comprised the Jaldhup portion of Patharia Hills and the eastern boundary of Jaldhup thana comprised the Patharkandi portion of Patharia Hills. This description of the boundaries between Jaldhup and Patharkandi was considered by Police Officers as vague (Document No. 226) and the correspondence filed before us (Documents Nos. 227-233) shows that there was a proposal to renotify the boundaries of Patharkandi thana by stating clearly that its western boundary would be the eastern boundary of the Reserve Forest, but no notification to that effect was actually issued. In 1938 a preliminary notification was issued stating that it was proposed to divide the old Jaldhup thana into Barlekha and Beani Bazar thanas to transfer to Beani Bazar certain circles of Karimganj thana. In 1940 the final notification was issued, dividing the old Jaldhup thana into the present thanas of Beani Bazar and Barlekha, but although it was

not specifically stated that any portion of the Jaldhup thana was being excluded from the new thana of Barlekha, its eastern boundary was described as the western boundary of the forest. There was however nothing in the notification to indicate any intention of including the Jaldhup portion of the forest into the Patharkandi thana. In 1937, a map (Document No. 256) was drawn up showing the new thanas of Beani Bazar and Barlekha although the old Jaldhup thana had not till then divided, and in this map in which this division was apparently anticipated, the boundary between Barlekha and Patharkandi was shown to be the same as it was between the old Jaldhup and the old Karimganj thanas in accordance with the notification of 1880. In 1947 this map was brought up to date and printed, noting therein various changes that has occurred since 1937; but in this map also the boundary line between Patharkandi and Barlekha was delineated as it was in the old 1937 map. Sir Cyril used this 1947 map for delineating the boundary between East Bengal (Pakistan) and the Assam Province (India).

Both the Dominions—India and Pakistan—claim the entire portion of the reserve forest in dispute. India contends that the 1940 Notification excluded the old Jaldhup portion of the reserve forest from the new Barlekha thana, and that though there was no Notification including that portion of the forest into Patharkandi thana, it could not be regarded as still in Barlekha thana, as Sir Cyril in his award has definitely stated that no portion of Sylhet to the east of the boundary line described in the award should belong to Pakistan. The line delineated by Sir Cyril on the map corresponds to the boundary that existed according to the 1880 Notification which had included in Jaldhup thana a portion of what is now the reserve forest. It is contended that this delineation is divergent from the description and should be ignored and that the boundary should run according to the description in the 1940 Notification excluding Jaldhup portion of the Patharia Hills Reserve Forest from the thana of Barlekha.

The case of Pakistan, on the other hand, is to the following effect:

The 1940 Notification was not intended to exclude from the old Jaldhup thana any portion of its area. Its only purpose was to divide the old Jaldhup thana into the thanas of Beani Bazar and Barlekha. This is clear from both the preliminary and the final Notification. The description of the eastern boundary of Barlekha thana in both these Notifications was obviously due to an error, and that entry by itself cannot have the legal effect of excluding the Jaldhup portion of the forest from Barlekha. The 1940 Notification does not and cannot therefore affect the forest. The line delineated on the map however is divergent from the description, because the boundary between Barlekha and Patharkandi ran in fact along the eastern boundary of the reserve forest. The revised notification of 1929 was vague and indefinite about the boundaries of the forest, as it referred only to Patharia Hills and not to the forest. The Police Officers uniformly acted on the basis that the Barlekha thana had jurisdiction over the entire forest. This fact in view of the vagueness of the Notification of 1922, is of considerable importance and supports the claim of Pakistan not only to the Barlekha portion of the forest but also to the portion of forest which according to India is included in the Patharkandi thana.

The respective portion of the forest in question may conveniently be referred to hereafter with reference to the colour in which they have been shown in the Index Map filed for India. The portion of the forest which was in the old Jaldhup thana is shown in white, and that in the old Karimganj thana which according to India fell into the Patharkandi limits appears in blue.

The contention of Pakistan that the Notification of 1940 does not legally affect the white portion has in my opinion to prevail. It is clear from the Assam Police Rules that whenever any portion of a thana is to be excluded from its jurisdiction notice of such a proposal has to be given to the public and objections invited. Such a procedure is necessary as the convenience of the people has to be taken into consideration while changing the jurisdiction of a thana. As stated already there is nothing in the notification apart from the description of the boundaries which can be said to indicate that the intention of the Government issuing the notification was to exclude from thana Barlekha the old Jaldhup portion of the forest. If the Government had such an intention, it is unthinkable that they

would have failed to notify in the preliminary notification of 1938 that the forest portion of Jaldhup thana would be excluded in the formation of Barlekha thana. The mention in the prelininary notification of the proposal to transfer to the new Beani Bazar thana some of the circles of Karimganj thana shows that the rule that proposals to transfer an area should be notified was being followed. The fact that there was no corresponding notification transferring the white portion *i.e.* the forest area of old Jaldhup thana to Patharkandi thana in itself clearly indicates that the Government did not intend to exclude any forest area from thana Barlekha and transfer it to thana Patharkandi. Similarly the fact that the map of 1947 in which several changes that had occurred since 1937 were embodied continued to show that the Jaldhup portion of the forest fell inside thana Barlekha, is yet another strong indication that the notification of 1940 was not intended to, and did not in fact, exclude the said forest area from Barlekha thana. Documents Nos. 234-236 prove that Barlekha police exercised jurisdiction over the village of Patharia Test most of which, including the oil wells, lies in the white portion *i.e.*, the old Jaldhup portion of the forest. In the Census Operation of 1941 (Documents Nos. 237 and 257) the village Patharia Test was shown as lying within the jurisdiction of Barlekha.

In these circumstances, the conclusion that the description of the eastern boundary of Barlekha in the 1940 notification must be an error, becomes irresistible. The said description has, therefore, no legal effect as far as the forest in question, *i.e.*, the portion in white in the index map is concerned and the only legal effect of that notification was the division of old Jaldhup thana into the new thanas of Beani Bazar and Barlekha without any reduction of the original area.

Even if it is assumed for argument's sake that the notification of 1940 had the legal effect of excluding the forest portion of the old Jaldhup thana, that portion *i.e.*, the white portion cannot be claimed by India in view of the fact that there was no notification including that portion in the Patharkandi thana. Without such a notification that portion of the forest cannot be considered to have become part of the thana of Patharkandi. If the white portion, *i.e.*, the portion of the forest which according to India has been excluded from Barlekha by the 1940 Notification does not become part of Patharkandi, there can be no common boundary line between that thana and the thana of Barlekha. The boundary line in this area as described in paragraph 13 of the award runs along the boundary between these two thanas, and if there happens to be no boundary between those two thanas India cannot claim the intermediate area for Assam on the strength of the concluding part of paragraph 13 of the award, which is a follows: —

> "So much of the district of Sylhet as lies to the west and north of this line shall be detached from the Province of Assam and transferred to the Province of East Bengal. No other part of the Province of Assam shall be transferred."

The words "this line" refer to the line described in the earlier part of the paragraph as running along the boundaries of the thanas noted in that paragraph, including the thanas of Barlekha and Patharkandi. If this line fails, India cannot rely on paragraph 13 of the award, and under Section 3, sub-section 3 (*a*) and (*c*) of the Indian Independence Act 1947 this area shall have to be treated as part of East Bengal and as excluded from Assam.

I therefore consider that India's claim in this respect cannot be allowed either on facts or in law and that the portion in white must be regarded as part of Barlekha thana *i.e.* part of Pakistan.

It now remains to consider the claim of Pakistan to the portion of forest marked in blue on the Index Map, which according to India is in Patharkandi thana. On behalf of Pakistan reliance is placed in this respect on Documents Nos. 243-245 and 234-236 to show that the police of old Jaldhup prior to 1940 and the Barlekha police since that year have been exercising jurisdiction over the blue portion of the forest also. Document No. 237 has been filed to show that in the Census Operations of 1941, residents of Patharia Test, which extends into the blue portion also, were treated as within the jurisdiction of Barlekha thana. Reliance is placed on Documents No. 243 and 245 to prove that the two cases mentioned therein relating to Madhabkund village, which is on the eastern fringe of

the forest, were dealt with by the old Jaldhup and the Barlekha police respectively. The map of Patharkandi circle of the year 1934 has also been filed as it shows that the Patharia Hills Reserve Forest was not inside the circle but outside it as the western boundary of thana Patharkandi. No documents showing that Patharkandi police exercised jurisdiction over any portion of the forest has been filed for India.

These documents and the circle map no doubt support the position taken by Pakistan that in fact jurisdiction over the white and blue areas of the forest was exercised by Jaldhup and Barlekha police and that the Police Officers considered the description of boundaries in the 1922 notification as vague and regarded the forest as entirely outside Patharkandi limits. But on a consideration of the boundaries mentioned in the 1922 notification I am not satisfied that they are vague as Patharia Hills mentioned therein cannot be said to exclude the forest. Further the proposal made by the officers to renotify the boundaries so as to exclude the forest from Patharkandi limits was not ultimately followed by the required notification. In the circumstances it cannot be said that the notification of 1922 excluded from the Patharkandi thana the old Karimganj portion of the forest or that there was in law a transfer of that portion to thana Jaldhup. In the absence of a notification effecting such a transfer mere exercise of jurisdiction cannot legally alter the boundary.

I am, therefore, of the opinion that the boundary line delineated on the map of the award accords with the description given in the award, that that line should be the boundary line in this area and that the portion of the forest to the west of that line *i.e.*, the portion shown in white in the Index Map should be awarded to East Bengal (Pakistan) and the portion to the east of the line *i.e.*, the portion shown in blue in the Index Map to the Province of Assam (India).

M. SHAHABUDDIN.

APPENDIX IX

The opinion of the Chairman on Dispute No. III

The case submitted in this dispute on behalf of the Government of India is that India claims the portion of the forest being to the west of the boundary line demarcated on the map "A" attached to the award.

The case submitted on behalf of the Government of Pakistan is that the true interpretation of paragraph 13 in the award is a boundary running along the eastern boundary of the Patharia Hills Reserve Forest from the point at which the boundary between thanas Kulaura and Patharkandi, as determined by the award, cuts the south-eastern boundary of the Reserve Forest northward up to the point at which the eastern boundary of the Reserve Forest meets the southern boundary of thana Karimganj.

According to the award the line shall be drawn along the boundary between the thanas of Patharkandi and Barlekha, and then along the boundary between the thanas of Karimganj and Barlekha, and then along its boundary between the thanas of Karimganj and Beani Bazar.

The thana Patharkandi did not exist as such until 1922 and the thana of Barlekha was constituted in 1940. Before that there existed two thanas *viz.*, Jaldhup and Karimganj, which had a common boundary. This boundary coincides with the line delineated on the man "A" by Sir Cyril Radcliffe. In 1920 the Patharia Hills Reserve Forest was formed. It appears from the description of the boundaries of the forest that the boundary line of Jaldhup thana cut the forest into two, the major portion being to the east of the boundary line and a small portion to the south-west. In 1922 Patharkandi which was till then an outpost of the Karimganj thana was converted into a thana. The west boundary of Patharkandi was described *inter alia* as Patharia Hills in thana Jaldhup. In the same notification the east boundary of Jaldhup was described *inter alia* as Patharia Hills of thana Karimganj and Patharia Hills of thana Patharkandi. By a notification of May 28th

1940 the thana of Jaldhup was split up into two thanas, namely Barlekha and Beani Bazar. The eastern boundary of thana Barlekha was described *inter alia* as the western boundary of the Patharia Hills Reserve Forest. The Jaldhup portion of the forest was not included in the thana of Barlekha or in the thana of Beani Bazar. No corresponding notification of the thana of Patharkandi was made including this portion within its ambit.

The Government of India base their case on the facts that when the thana of Jaldhup was split up into two thana, namely, Barlekha and Beani Bazar, and when the notification of 1940 constituted these thanas and described their boundaries, the Jaldhup portion of the forest was excluded from the new thana of Barlekha. Sir Cyril Radcliffe has in his award described the Inter-Dominion line in terms of thana boundaries. The line shall run along the boundary between the thanas of Patharkandi and Barlekha. Sir Cyril's line of demarcation in his Map "A", which is attached to the award, leaves, however, the portion of the forest thus excluded from Barlekha as if it were in Barlekha. For the purpose of illustration Sir Cyril adopted the map of 1937. But he has provided that in case of any divergence between the map and his description, the description will prevail.

The Government of Pakistan submits as a basis for their claim to the whole of Patharia Hills Reserve Forest as follows; For a number of years up to the date of the award and thereafter when occasion arose for the exercise of police jurisdiction within the boundaries of Patharia Hills Reserve Forest, such jurisdiction was exercised by thana Jaldhup up to 1940 and thereafter by thana Barlekha. In the year 1934, when a circle map of Patharkandi Circle was made, that circle did not extend to any part of Patharia Hills Reserve Forest. In the year 1941, the official Census Report included in thana Barlekha persons resident within the boundaries of that forest.

As regards especially Barlekha the Government of Pakistan submit:

(*a*) that while the expression "along the boundary between the thanas of Patharkandi and Barlekha" in paragraph 13 of the Award is unambiguous, the delineation of that boundary in the map "A" attached to the Award is incorrect in that it does not show the boundary as stated in the Award; and that, in accordance with the terms of paragraph 14 of the Award, the description of the boundary in paragraph 13 of the Award must prevail;

(*b*) that the description of the eastern boundary of thana Barlekha in the preliminary notification, dated 2nd September 1938 and in the final notification, dated 28th May, 1940, was made by error; and the said notification was not made in accordance with the requirements of Rule 203 of the Assam Police Manual and the form thereby prescribed and was therefore illegal; and that it was also not acted upon;

(*c*) that if, on the other hand, the said notification is a valid and effective notification to alter the boundaries of thana Barlekha, there was, in such a case, at the date of the Award, no common boundary between thana Barlekha and thana Patharkandi.

As regards the claim of India to the Jaldhup portion of the forest excluded from Barlekha by the notification of 1940 and Pakistan's claim to that same portion it is established that there does not exist nor did it exist at the time of the award any such common boundary between the thanas of Patharkandi and Barlekha as provided in the award.

The boundary cannot therefore be decided only by reading the description in the award. It is true that generally the map "A" attached to the award only serves the purposes of illustration, but this principle involves a description in the award which is complete and which makes it possible to draw the line after it.

If the description is incomplete we must be allowed to use the map not only as an illustration to the description but also as affording the necessary completion of the description.

The Government of India has submitted that regard should be had to the prescription in the award that so much of the district of Sylhet as lies to the west and north of the described boundary line *i.e. inter alia*, the line running along the boundary between the

thanas of Patharkandi and Barlekha, shall be detached from the Province of Assam and transferred to the Province of East Bengal. This submission does not seem to solve the difficulty, as no such common boundary between the thanas Partharkandi and Barlekha does exist and the boundary line as demarcated on the map has been drawn along the old common boundary line between the thanas of Patharkandi and Jaldhup. With regard to that fact and to the fact that the description provides a common thana boundary line the Jaldhup portion of the forest must be treated as if it belonged to the thana of Barlekha.

As to the claim of Pakistan to the portion of the forest situated in the thana of Karimganj I cannot find that what has been put forward as arguments for such a claim are convincing. Even if there may have been police jurisdiction by the thana Barlekha exercised somewhere in the forest neither this nor the other circumstances relied on by the Pakistan Government can be considered to constitute a boundary thana line as provided in the description of the award. Even here replies what has been said as regards the portion of the forest claimed by India.

My conclusion is therefore that the line indicated in the map marked "A" attached to the award is the boundary between India and Pakistan.

Algot BAGGE.

APPENDIX X

Opinion of the Hon'ble Mr. Justice N. Chandrasekhara Aiyar on Dispute No. IV

Paragraph 13 of Sir Cyril's report is in these terms—

"In those circumstances I think that some exchange of territories must be effected if a workable division is to result. Some of the non-Muslim thanas must go to East Bengal and some Muslim territory and Hailakandi must be retained by Assam. Accordingly I decide and award as follows: —

"A line shall be drawn from the point where the boundary between the thanas of Patharkandi and Kulaura meets the frontier of Tripura State and shall run north along the boundary between those thanas, then along the boundary between the thanas Patharkandi and Barlekha, then along the boundary between the thanas of Karimganj and Barlekha, and then along the boundary between the thanas of Karimganj and Beani Bazar to the point where that boundary meets the river Kusiyara. The line shall then turn to the east taking the river Kusiyara as the boundary and run to the point where that river meets the boundary between the districts of Sylhet and Cachar. The centre line of the main stream or channel shall constitute the boundary. So much of the district of Sylhet as lies to the west and north of this line shall be detached from the Province of Assam and transferred to the Province of East Bengal. No other part of the Province of Assam shall be transferred."

2. In his map—annexure "B" to the report—the line is drawn from A to B northwards and from B to C eastwards. B is above the place marked Birasri and C is to the east of Amalsid. According to Sir Cyril, B to C is the course of the Kusiyara river.

3. The case for Pakistan is that B to C does not represent the course of the Kusiyara river but that it is the course of the Boglia river. According to them, the real Kusiyara runs to the south of Karimganj town from Nilam Bazar and that flowing westwards from there it joins some other stream or streams and becomes Kusiyara from Bairagi Bazar downwards.

4. It is only out of deference to the learned Advocate General of East Bengal that I propose to take a few minutes over this contention. It is totally devoid of any substance.

5. We are not at all concerned with ancient maps (survey or thak) which give the name Kusiyara to some other stream or channel, or which mention Pooran Kusiyara or Langai or Sonai or Sonal. The map of 1937 which Sir Cyril had before him shows very

clearly the course of the stream. It lies to the north of Bairagi Bazar, and Birasri (which is slightly to the north-east of his point B), and from there the course is along the red line up to the point C. It has the name "Boglia R." given to it below Amalsid and above Bhanga in Badarput.

6. Sir Cyril had abundant material before him, apart from the particular map, to assume that BC represented the course of the Kusiyara river; and his assumption was correct, whatever the remote history may have been.

7. The India documents mostly consisting of maps and notifications, and Imperial and District Gazetteers, establish this beyond doubt or controversy. I do not propose to refer to all of them. It is enough to draw attention to the revenue survey map, marked Doc. 338, —which is based upon the circuit maps which follow it (Docts. 384 to 395)—and the maps Doc. 396 and Doc. 397. The Karimganj Municipality map drawn in 1915 is Doc. 399. The topographical maps are Docs 410, 402 and 403. The Imperial Gazetteer of India 1887 by Sir William Hunter (Doc. 344) mentions that the river Barak which flows from Cachar forthwith bifurcales into two branches, Surma in the north and Kusiyara in the south. To the same effect is the Imperial Gazetteer of 1909 (Doc. 346). The Assam District Gazetteer (Doc. 345) mentions the river from C to B as Kusiyara. The Illam settlement officer's report (Doc. 351) at page 67 of India's documents confirmed by the order of the Governor of Assam in Council at page 69 shows Sir Cyril's river as the Kusiyara. It is really futile, after all this, to contend that Sir Cyril was not justified in assuming that the river between B and C was Kusiyara.

8. It is very common for the same river to be known by different names at different places or different sections of its course. Boglia may well be the name of Kusiyara in some part of it. In fact, Sir Cyril had the name "Boglia R." before him when he drew his line.

9. But even conceding for a moment that Sir Cyril was wrong in thinking that BC was Kusiyara, what follows? The river course was there, he took it to be Kusiyara; and said that it should be the boundary between the two Dominions. He had every right to say so.

10. The position taken by Pakistan leads to a patent absurdity. Points B and C cannot be reached at all if Kusiyara is what Pakistan would have it to be. The line BC would fail altogether and there is no alternative line to choose even if we are authorised to do so. It will be the substitution of a fresh line altogether. Mr. Faiz Ali had to admit this and settle down to the concession that on equitable grounds he was prepared to take a portion of the course BC as Kusiyara.

11. The argument that under our terms of reference we have only to find out the course of the river Kusiyara and not determine whether BC was properly determined as the boundary by Sir Cyril needs no serious attention much less refutation. It is because of the dispute between the two Dominions as regards BC that we have been asked to state or determine what is the course of the river. It is not for purposes of abstract geography or history or in the interests of antiquarian research that this Tribunal has been constituted.

12. BC is the correct course of the Kusiyara river and Sir Cyril's award that it shall be the boundary between the two States must be given effect to.

13. I may add a word about the boundary line proceeding north from the north-western corner of the Patharia Hill Forest up to the point B in the map (near Birasri). There are no adequate grounds for holding that this is not a correct delineation of the boundary. Therefore, this portion of the western boundary line as shown in Sir Cyril's award map will also stand.

N. CHANDRASEKHARA AIYAR.

APPENDIX XI

Opinion of the Hon'ble Mr. Justice Shahabuddin on Dispute No. IV

This dispute relates to a portion of the boundary line dividing, between East Bengal (Pakistan) and Assam (India), the district of Sylhet as it was prior to the partition of 1947. This boundary is described, in paragraph 13 of Sir Cyril Radcliffe's Report of the Bengal Boundary Commission relating to Sylhet district and the adjoining districts of Assam, as running along the Kusiyara river.

In the map of the district of Sylhet Sir Cyril has delineated this boundary by a line coming from point "A" and extending up to the point "B" which lies on a river that flows from Cachar towards the west and thence in a south-westerly direction. The line then proceeds from point "B" to point "C" in the map where the river branches off from the Barak river of Cachar. Near point "C" in the map the river is described as Boglia river. There is no other name written on the map till the river turns in a south-westerly direction, and when it takes this turn its name is mentioned for the first time in the map as river Kusiyara. Lower down to the south of point "B" the boundary between the thanas of Beani Bazar and Karimganj meets a river flowing from the east in a south-westerly direction and its name is noted on the map as river Sonai. This river at its eastern and near Karimganj town is a bifurcation from the river described as Boglia at its off-take from the river Barak. For the sake of convenience, the river named Sonai in the map will hereafter be referred to as the "southern river" and the other river *i.e.*, the one which is marked as the boundary between points "B" and "C" on the map, as the "northern river".

The case for Pakistan is as follows: —

The southern river was wrongly named in the map as Sonai. It is in fact the river Kusiyara, and has been bearing that name both in the past and the present. On the other hand the northern river is named Boglia and not Kusiyara. The description of the boundary in this area clearly refers to the Kusiyara river and not to any other river, and also in the terms of reference to this Tribunal the specific question raised with regard to the dispute is about the course of the river Kusiyara. It has, therefore, to be determined whether the northern river is the river Kusiyara or the southern. The delineation of the boundary in the map is wrong on account of serious mistakes of facts which have resulted principally from the wrong naming of these rivers on the map. There is therefore a divergence between the map and the description and the map has to be ignored. The southern river turns eastwards after the boundary between the thanas of Karimganj and Beani Bazar meets it, but it does not, strictly speaking, by itself reach Cachar. This would result in the boundary remaining undetermined in part and in order to avoid that contingency a proper and equitable solution of the difficulty is that the boundary line should be held to run along the southern river up to the point where it draws its waters from the northern river through Noti Khal and thence along the eastern portion of the northern river to the Sylhet-Cachar boundary. This would amount to a just and reasonable implementation of the dominant intention of Sir Cyril which was to make the river Kusiyara a boundary between Assam and East Bengal.

The case on behalf of India is that the southern river is known as Sonai or Pooran Kusiyara, while the northern river is known not only as Boglia but also as Kusiyara. There is therefore no divergence between the award and the map. Consequently the boundary as delineated on the map should be followed as the correct boundary.

On behalf of Pakistan three Government Notifications, and a number of documents executed by persons residing on the banks of the two rivers, have been filed. Several decrees of Civil Courts have also been filed. These documents prove that the northern river was called Boglia and the southern river Kusiyara. The documents referred to range from 1871 down to 1947. A number of maps dating from 1772 down to 1922 have also been filed by Pakistan. On behalf of India also several Government Notifications, and several maps, old and recent, have been filed in support of its case that the northern river is known as Boglia or Kusiyara, and the southern river as Pooran Kusiyara or Sonai.

As contended on behalf of Pakistan it appears to me that with regard to the determination of the names of the rivers in question the statements made by persons living on their banks in deeds of transfer for a great number of years are of considerable importance. On behalf of India no such documents have been filed showing that the northern river was called Kusiyara. In the notification of 1938 relating to Karimganj and other thanas (Document No. 354) the southern river which is named in Sir Cyril's map as Sonai has been described as the river Kusiyara. In the notification of 1922 (Document No. 350) in which the boundaries of all police stations in the district of Sylhet are revised the northern river to the east of thana Karimganj is mentioned as Boglia. Similarly, in the same notification relating to the police station of Badarpur the northern river is again named Boglia. In a notification of 1928 filed by Pakistan (Document No. 260) in describing the boundaries of a piece of law notified for acquisition in the village Dasgram the southern river is described as Kusiyara (Longai).

The northern river is not named as Kusiyara in all the notifications though in most of those relied on by India it is mentioned as Boglia or Kusiyara or Barak. But having regard to the importance which I think should be attached to the statements of the persons living in the locality and the ancient maps of high authority, it appears to me that the preponderance of evidence is in favour of the southern river being Kusiyara and the northern river being Boglia, though it cannot be denied that the northern river has also described as Kusiyara in a number of maps, notifications and Gazetteers. I therefore think that the naming of the southern river as Sonai in the map was clearly a mistake, and that it should have been described as Kusiyara. It also appears that Sir Cyril was under the wrong impression that the river which he was delineating on the map was flowing towards Cachar, while in fact it flows from Cachar westwards. This is clear from the fact that though the map before him described the northern river as river Boglia at its off-take he seems to have ignored that important fact and mistaken the river to be Kusiyara, because he found the words "River Kusiyara" written on the extreme west of the northern river and he wrongly presumed it to be flowing towards the east up to the point Birasri and also further east of that point. In these circumstances, there is considerable force in the contention of the learned Advocate-General of East Bengal that the delineation of the boundary was made on the map under a serious mistake of fact. It does not appear that there was before Sir Cyril an issue as to Kusiyara, and evidently he was under the impression that there was only one river named Kusiyara and was therefore misled by the map. Had the southern river been correctly described as Kusiyara and not wrongly as Sonai on the map the delineation would presumably have been along that river as the land boundary meets that river first and it also provides a continuous boundary line eastwards up to Cachar, forming as it does one continuous river line from Barak through the eastern portion of the northern river and the Noti Khal up to the land boundary. The southern river had a preferential claim to be made the boundary as the land boundary meets it first and it has been known as Kusiyara since 1772. However, if a strictly technical view is taken, the southern river may not be said to reach the borders of Cachar and this would result in a partial non-determination of the boundary. To avoid this, the contention of the learned Advocate-General of East Bengal that the boundary line should run along the southern river up to the point where it draws its waters from the northern river through Noti Khal and thence along that river deserves to be accepted on the broad principles of justice and equity. After all the head-waters of the southern river cannot be dissociated from the river itself.

I am therefore of the opinion that the boundary in this area should run along the southern river *i.e.*, the river wrongly described as Sonai in the Award map, from the point where the land boundary running from the south to the north meets the said river, to the point from where that river takes its waters through Noti Khal from the northern river *i.e.*, the river named on the said map as Boglia, and thence along the latter river to the boundary between the districts of Sylhet and Cachar.

M. SHAHABUDDIN.

APPENDIX XII

The opinion of the Chairman on Dispute No. IV

The case submitted in this dispute on behalf of the Government of Pakistan is that the black line on the map marked "A" attached to the award, going from Gobindapur to Karimganj town, just passing under a figure 32 on the map "A" shall form the boundary line between East Bengal and Assam. As to the boundary line delineated on the map from Karimganj to the boundary between the districts of Sylhet and Cachar the Government of Pakistan concede that this part of the boundary line is following a river which for equitable reasons may be deemed to be the river Kusiyara.

The case submitted by the Government of India is that the red line delineated in the map "A" attached to the award as going from Gobindapur over Birasri to Karimganj town and continuing to the boundary between the districts of Sylhet and Cachar shall be the boundary line between East Bengal and Assam.

The base of the contention of the Government of Pakistan is that the course of the river Kusiyara is running as shown by the black line afore-mentioned on the map "A" until the little stream Noti Khal which is joining the river Kusiyara with the river which further on meets the boundary between the districts of Sylhet and Cachar and which river for equitable reasons may be deemed to be the river Kusiyara.

The base of the claim of the Government of India is that the course of the River Kusiyara is running along the red line aforementioned, delineated on the map "A".

There is in fact a certain confusion as regards the name of the river which according to the description and the map shall be taken as the boundary between India and Pakistan from the point where the boundary between the thanas of Karimganj and Beani Bazar meets this river until the point where the river meets the boundary between the districts of Sylhet and Cachar.

The river which the boundary delineated on the map "A" is following, has, according to evidence produced, been called from time to time Kusiyara or Boglia or Barak, and the last stretch of the river which according to the Government of Pakistan ought to be taken as the boundary for arriving at a just and reasonable implementation of the dominant intention of Sir Cyril Radcliffe is on the map itself called the Boglia river. On the other side the name of Kusiyara has been used also for the river relied upon by the Government of Pakistan which river through a stream called Noti Khal is connected with the river which on the map "A" is marked Boglia.

It seems to me that under such circumstances the name of the river used in the description does not give in itself a sufficient guidance. The fact, that Sir Cyril Radcliffe has in delineating the boundary followed the first-mentioned river, must then be taken as a sufficient proof that this river is the river referred to in the description.

My conclusion is therefore that from the point where the boundary between the thanas of Karimganj and Beani Bazar meets the river described as the Sonai river on the map "A" attached to the award (Gobindapur) up to the point marked "B" on the map (Birasri) the red line indicated on the map is the boundary between India and Pakistan.

From the point "B" on the map the boundary between India and Pakistan shall turn to the east and follow the river which according to the map runs to that point from the point on the boundary line between the districts of Sylhet and Cachar which has been marked "C" on the map.

Algot BAGGE.

PART II

**Case concerning a dispute between
Argentina and Chile
concerning the Beagle Channel**

**Affaire concernant un litige entre la République argentine
et la République du Chili
relatif au canal de Beagle**

CASE CONCERNING A DISPUTE BETWEEN ARGENTINA AND CHILE CONCERNING THE BEAGLE CHANNEL

[*Editorial note*

A dispute having arisen between Argentina and Chile concerning the territorial and maritime boundaries between them and the title to certain islands, islets and rocks near the extreme end of the South American continent (the region of the eastern Beagle Channel), an Arbitration Tribunal was established pursuant to a compromise signed on 22 July 1971 (see p. 64 below). On 18 February 1977, the Tribunal rendered its award (see p. 77 below).

In an exchange of diplomatic notes dated 25 and 26 January 1978 (see p. 226 below), Argentina declared the award insuperably null and void in accordance with international law and Chile rejected this "declaration of invalidity".

On 20 February 1978, Argentina and Chile signed an agreement in Puerto Montt, Chile, to resolve through negotiations issues pertaining to the relations between the two countries, particularly those stemming from the situation in the southern region (see p. 237 below). On 8 January 1979, the two States signed the Act of Montevideo by which they requested the Holy See to act as a mediator with regard to their dispute over the southern region (see p. 240 below).

On 12 December 1980, the Holy See delivered a papal proposal for the solution of the dispute in the southern region to the two States (see p. 243 below). On 23 January 1984, the two States signed a joint declaration of peace and friendship, reaffirming their will to achieve a settlement to the dispute submitted to the mediation of His Holiness, Pope John Paul II, without delay (see p. 249 below). On 29 November 1984 Argentina and Chile signed a treaty of peace and friendship which, "taking especially into account the Proposal of the Mediator, suggestions and advise", defined the boundary between the respective sovereignties over the sea, seabed and subsoil of the two countries in the sea of the southern zone (see p. 250 below).]

AFFAIRE CONCERNANT UN LITIGE ENTRE LA RÉPUBLIQUE ARGENTINE ET LA RÉPUBLIQUE DU CHILI RELATIF AU CANAL DE BEAGLE

[*Note de l'éditeur*

Un différend ayant surgi entre l'Argentine et le Chili à propos des frontières terrestres et maritimes entre les deux pays et de la revendication de certains îles, îlots et rochers situés à l'extrémité du continent sud-américain (la région orientale du canal de Beagle), une cour d'arbitrage a été instituée en vertu d'un compromis signé le 22 juillet 1971 (voir ci-après p. 64). Le 18 février 1977, la cour a rendu sa sentence (voir ci-après p. 77).

Dans un échange de notes diplomatiques datées des 25 et 26 janvier 1978 (voir ci-après p. 226), l'Argentine a déclaré la sentence nulle et non avenue au regard du droit international. Le Chili a rejeté cette "déclaration de nullité".

Le 20 février 1978, l'Argentine et le Chili ont signé à Puerto Montt (Chili) un accord en vue de régler par voie de négociations, les questions ayant trait aux relations entre les deux pays, notamment celles découlant de la situation dans la région australe (voir ci-après p. 237). Le 8 janvier 1979, les deux Etats ont signé l'acte de Montevideo par lequel ils ont prié le Saint-Siège d'intervenir en médiateur dans le différend dont la région australe faisait l'objet (voir ci-après p. 240).

Le 12 décembre 1980, le Saint-Siège a saisi les deux Etats d'une proposition de règlement du différend dans la région australe, émanant du Pape (voir ci-après p. 243). Le 23 janvier 1984, les deux Etats ont signé une déclaration de paix et d'amitié conjointe réaffirmant leur volonté de régler rapidement le différend soumis à la médiation de S. S. le pape Jean-Paul II (voir ci-après p. 249). Le 29 novembre 1984, l'Argentine et le Chili ont signé un traité de paix et d'amitié qui, "tenant compte en particulier de la Proposition du médiateur, des suggestions et conseils", a défini les domaines de souveraineté respectifs des deux Etats sur la mer, les fonds marins et le sous-sol dans l'espace maritime de la zone australe (voir ci-après p. 250).]

I

BEAGLE CHANNEL ARBITRATION BETWEEN THE REPUBLIC OF ARGENTINA AND THE REPUBLIC OF CHILE

REPORT AND DECISION OF THE COURT OF ARBITRATION

18 February 1977

ARBITRAGE CONCERNANT LE CANAL DE BEAGLE ENTRE LA RÉPUBLIQUE ARGENTINE ET LE CHILI

RAPPORT ET DÉCISION DE LA COUR D'ARBITRAGE

18 février 1977

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* [*Maps are not reproduced.*]

PART I: REPORT

A. *Personnel of the Case*

THE COURT:

Members (as appointed on 22 July 1971):

Judge Sir Gerald Fitzmaurice (President)
Judge André Gros
Judge Sture Petrén
Judge Charles Onyeama
Judge Hardy C. Dillard

Registrar

Professor Philippe Cahier

THE PARTIES:

The Argentine Republic, represented by

As Agents:

His Excellency Señor Ernesto de la Guardia, Ambassador Extraordinary and Plenipotentiary on Special Mission.

His Excellency Señor Julio Barboza, Ambassador Extraordinary and Plenipotentiary on Special Mission.

As Advisers:

His Excellency Señor Luis María de Pablo Pardo, Ambassador Extraordinary and Plenipotentiary of the Argentine Republic in the Swiss Confederation, Professor of International Law in the Argentine Catholic University, Buenos Aires.

Rear-Admiral Señor Raúl A. Fitte, Argentine Navy.

As Counsel:

Professor Roberto Ago, Professor of International Law in the Faculty of Law of the University of Rome.

Professor Robert Y. Jennings, Q.C., Whewell Professor of International Law in the University of Cambridge.

Professor Paul Reuter, Professor in the University of Law, Economics and Social Sciences of Paris.

Other Advisers, Experts and Secretaries:

Señor Enrique J. A. Candioti, Minister Plenipotentiary, Argentine Agency, Geneva.

Señor Marcelo Delpech, Minister Plenipotentiary, Argentine Agency, Geneva.

Señorita Susana Ruiz Cerutti, First Secretary, Argentine Agency, Geneva.

Señor Federico Mirré, First Secretary,
Argentine Embassy, London.

Señorita Graciela Sabá, Second Secretary,
Argentine Agency, Geneva.

Señora Luisa E. C. de Lemos, Administrative Officer,
Argentine Agency, Geneva.

Señorita Alejandra Robinson, Administrative Officer,
Argentine Agency, Geneva.

Señorita Clara Patiño Mayer, Administrative Officer,
Argentine Agency, Geneva.

The Republic of Chile, represented by

As Agent:

His Excellency Señor Don José Miguel Barros, Ambassador Extraordinary and Plenipotentiary of Chile to the Netherlands and on Special Mission in the United Kingdom.

As Counsel:

Professor Prosper Weil, Professor in the University of Law, Economics and Social Sciences of Paris.

Professor Ian Brownlie, D.C.L. Professor of International Law in the University of London.

Professor Julio Philippi, Professor of Philosophy of Civil Law in the Catholic University of Santiago.

Other Advisers, Experts and Secretaries:

Señor Don Germán Carrasco, Minister Counsellor,
Secretary General to the Chilean Agency, Geneva.

Commander Kenneth Pugh, Chilean Navy.

Señor Don Osvaldo Muñoz, Expert Adviser, Licenciado en Ciencias Jurídicas y Sociales de la Universidad de Chile, Chilean Agency, Geneva.

Señor Don Ignacio Cox, Chilean Agency, Geneva.

John Walford, Esq.; Solicitor (Bischoff and Co.).

Jasper Hunt, Esq.; Solicitor (Bischoff and Co.).

B. *Steps Preceding the Reference to Arbitration*

On 11 December 1967, the Chilean Ambassador in London, His Excellency Señor Don Víctor Santa Cruz delivered on behalf of the Government of the Republic of Chile a Note addressed to Her Majesty's Principal Secretary of State for Foreign Affairs, the Right Honourable George Brown, M.P., in which he referred to a dispute existing between the Republic of Chile and the Republic of Argentina concerning sovereignty over certain islands situated in the region of the Beagle Channel, and mentioned various attempts to reach agreement for the submission of the dispute to adjudication that had come to nothing. He then continued:

> As it is imperative to find an early solution to this dispute, and having regard to the above-mentioned default of agreement, the Government of Chile has decided to have recourse to Her Majesty's Government as permanent arbitrator under the 1902 General Treaty of Arbitration [sc. between Chile and Argentina], and in this connection to invite them to intervene as Arbiter in the manner provided for in Article 5 of that Treaty.

There followed the formal request, made on the instructions of the Government of Chile, that the necessary proceedings should be initiated by Her Majesty's Government.

On the same day the Chilean Minister for Foreign Affairs sent the Ambassador of the Argentine Republic in Santiago a Note in which, after recalling the negotiations between the two countries, he informed him of the *démarche* made in London.

In a note of 19 December 1967, addressed to the Argentine Ambassador in London, Her Majesty's Government asked the Argentine Government whether it wished to make any comments in regard to the Chilean request.

The Argentine Ambassador in London replied on 29 December sending copies of two Notes dated 23 December, addressed by the Argentine Foreign Minister to the Chilean Ambassador in Buenos Aires, in which it was stressed that no agreement had been reached between the two countries as to the applicability of the Treaty of 1902 to the extant dispute, and invited the Chilean Government to resume negotiations.

There were no immediate results; but in the end the two Governments, overcoming their differences of view, succeeded in arriving at an agreement for submitting the case to arbitration, and thus it was that, on 22 July 1971, there was signed in London between Her Britannic Majesty's Government, the Government of the Republic of Argentina and the Government of the Republic of Chile, an agreement entitle "Agreement for Arbitration (*Compromiso*) of a controversy between the Argentine Republic and the Republic of Chile concerning the Region of the Beagle Channel", the English and Spanish texts of which, both equally authentic, are set out in the next following section.

C. *The Arbitration Agreement or Compromiso*

POR CUANTO la República Argentina y la República de Chile (en adelante llamadas "las Partes", nominadas en orden alfabético en este instrumento) son partes de un Tratado General de Arbitraje (en adelante denominado "el Tratado") firmado en Santiago de Chile el 28 de mayo de 1902;

POR CUANTO el Gobierno de Su Majestad Británica aceptó debidamente el cargo de Árbitro que le confirió el Tratado;

POR CUANTO entre las Partes ha surgido una controversia en la zona del Canal de Beagle;

POR CUANTO, en esta oportunidad, las Partes han coincidido en la aplicación del Tratado a esta controversia y han requerido la intervención como Árbitro del Gobierno de Su Majestad Británica;

POR CUANTO el Gobierno de Su Majestad Británica, luego de oír a las Partes, se ha convencido de que puede actuar como Árbitro en la controversia;

POR CUANTO para cumplir sus funciones de Árbitro el Gobierno de Su Majestad Británica ha designado una Corte Arbitral integrada por los siguientes miembros:

Sr. Hardy C. Dillard
(Estados Unidos de América)
Sir Gerald Fitzmaurice
(Reino Unido)
Sr. André Gros (Francia)
Sr. Charles D. Onyeama
(Nigeria)
Sr. Sture Petrén (Suecia);

WHEREAS the Argentine Republic and the Republic of Chile (hereinafter referred to as "the Parties", named in alphabetical order in this instrument) are parties to a General Treaty of Arbitration signed at Santiago on 28th May 1902 (hereinafter referred to as "the Treaty");

AND WHEREAS His Britannic Majesty's Government duly accepted the duty of Arbitrator conferred upon them by the Treaty;

AND WHEREAS a controversy has arisen between the Parties concerning the region of the Beagle Channel;

AND WHEREAS, on this occasion, the Parties have concurred with regard to the applicability of the Treaty to this controversy, and have requested the intervention of Her Britannic Majesty's Government as Arbitrator;

AND WHEREAS Her Britannic Majesty's Government, after hearing the Parties, are satisfied that it would be appropriate for them to act as Arbitrator in the controversy;

AND WHEREAS for the purpose of fulfilling their duties as Arbitrator, Her Britannic Majesty's Government have appointed a Court of Arbitration composed of the following members:

Mr. Hardy C. Dillard
(United States of America)
Sir Gerald Fitzmaurice
(United Kingdom)
Mr. André Gros (France)
Mr. Charles D. Onyeama
(Nigeria) and
Mr. Sture Petrén (Sweden);

El Gobierno de Su Majestad Británica, de conformidad con el Tratado y luego de consultar separadamente a las Partes, ha fijado el Acuerdo de Arbitraje (Compromiso) como sigue:

ARTÍCULO I

1) La República Argentina solicita que el Arbitro determine cuál es la línea del límite entre las respectivas jurisdicciones marítimas de la República Argentina y la República de Chile desde el meridiano 68°36'38.5" W., dentro de la región mencionada en el párrafo 4) de este Artículo, y en consecuencia declare que pertenecen a la República Argentina las islas Picton, Nueva y Lennox e islas e islotes adyacentes.

2) La República de Chile solicita que el Árbitro resuelva las cuestiones planteadas en sus notas de 11 de diciembre de 1967 al Gobierno de Su Majestad Británica y al Gobierno de la República Argentina, en cuanto se relacionan con la región a que se refiere el párrafo 4) de este Artículo, y que declare que pertenecen a la República de Chile las islas Picton, Lennox y Nueva, islas e islotes adyacentes, como asimismo las demás islas e islotes cuya superficie total se encuentra íntegramente dentro de la zona indicada en el párrafo 4) de este Artículo.

3) Las cuestiones mencionadas en los dos párrafos predecentes constituyen la expresión de la voluntad de las Partes respecto de los puntos controvertidos, sobre los cuales deberá decidir la Corte Arbitral.

Her Britannic Majesty's Government, in accordance with the Treaty and after consulting the Parties separately, have determined the Arbitration Agreement (Compromiso) as follows:

ARTICLE I

(1) The Argentine Republic requests the Arbitrator to determine what is the boundary-line between the respective maritime jurisdictions of the Argentine Republic and of the Republic of Chile from meridian 68°36'38.5" W., within the region referred to in paragraph (4) of this Article, and in consequence to declare that Picton, Nueva and Lennox Islands and adjacent islands and islets belong to the Argentine Republic.

(2) The Republic of Chile requests the Arbitrator to decide, to the extent that they relate to the region referred to in paragraph (4) of this Article, the questions referred to in her Notes of 11th December 1967 to Her Britannic Majesty's Government and to the Government of the Argentine Republic and to declare that Picton, Lennox and Nueva Islands, the adjacent islands and islets, as well as the other islands and islets whose entire land surface is situated wholly within the region referred to in paragraph (4) of this Article, belong to the Republic of Chile.

(3) The questions specified in the two foregoing paragraphs express the will of the Parties as to the points in dispute which are to be decided by the Court of Arbitration.

4) La región a que se refieren los párrafos 1) y 2) de este Artículo está determinada por seis puntas cuyas coordenadas geográficas son las siguientes:

	Latitud (S)	*Longitud (W)*
A	54°45′	68°36′ 38.5″
B	54°57′	68°36′ 38.5″
C	54°57′	67°13′
D	55°24′	67°13′
E	55°24′	66°25′
F	54°45′	66°25′

5) El orden en que las preguntas figuran en este Acuerdo de Arbitraje (Compromiso) no implica prelación alguna de una sobre la otra para su consideración por la Corte Arbitral, ni un prejuzgamiento en cuanto al peso de la prueba.

6) Las peticiones que la República Argentina y la República de Chile han formulado en los párrafos 1) y 2) de este Artículo, no constituyen para la otra Parte, ni directa ni indirectamente, una aceptación de las afirmaciones de derecho ni de hecho contenidas en dichas peticiones.

7) La Corte Arbitral deberá decidir de acuerdo con los principios del derecho internacional.

ARTÍCULO II

La Corte Arbitral, de acuerdo con las disposiciones de este Acuerdo de Arbitraje (Compromiso), considerará las cuestiones expresadas en los párrafos 1) y 2) del Artículo I y transmitirá al Gobierno de Su Majestad Británica su decisión al respecto.

(4) The region referred to in paragraphs (1) and (2) of this Article is determined by six points the geographical co-ordinates of which are the following:

	Latitude (S)	*Longitude (W)*
A	54°45′	68°36′ 38.5″
B	54°57′	68°36′ 38.5″
C	54°57′	67°13′
D	55°24′	67°13′
E	55°24′	66°25′
F	54°45′	66°25′

(5) The order in which the questions appear in this Agreement (Compromiso) shall not imply any precedence of the one over the other with regard to their consideration by the Court of Arbitration, and shall be without prejudice to any burden of proof.

(6) The submissions in paragraphs (1) and (2) of this Article which the Argentine Republic and the Republic of Chile respectively have presented shall not constitute for the other Party, either directly or indirectly, acceptance of the assertions of law or fact contained in those submissions.

(7) The Court of Arbitration shall reach its conclusions in accordance with the principles of international law.

ARTICLE II

The Court of Arbitration, acting in accordance with the provisions of this Agreement (Compromiso), shall consider the questions specified in paragraphs (1) and (2) of Article I and transmit to Her Britannic Majesty's Government its decision thereon.

ARTÍCULO III

1) La Corte Arbitral eligirá uno de sus Miembros como Presidente. Asimismo designará un Secretario.

2) La Corte Arbitral fijará su sede en un lugar que no merezca observaciones de alguna de las Partes.

ARTÍCULO IV

1) Dentro de un mes a contar de la fecha de la firma del presente Acuerdo de Arbitraje (Compromiso), cada una de las Partes nombrará uno o más Agentes para los efectos del Arbitraje, quienes fijarán un domicilio en la vecindad de la sede de la Corte Arbitral. Las Partes comunicarán al Gobierno de Su Majestad Británica, a la Corte Arbitral y a la otra Parte el nombre y domicilio de esos Agentes.

2) Si cualquiera de las Partes designara más de un Agente, ellos estarán facultados para actuar conjunta o separadamente.

ARTÍCULO V

1) La Corte Arbitral, sujeta a las disposiciones de este Acuerdo de Arbitraje (Compromiso) y luego de consultar a las Partes, fijará sus Reglas de Procedimiento y determinará el orden y fecha de entrega de los alegatos escritos y mapas y todas las demás cuestiones de procedimiento, escrito y oral, que pudieran surgir. La determinación del orden en que deban presentarse estos documentos se hará sin perjuicio de cualquier cuestión relativa al peso de la prueba.

ARTICLE III

(1) The Court of Arbitration shall elect one of its members as President. It shall also appoint a Registrar.

(2) The Court of Arbitration shall establish its seat at a place not objected to by either Party.

ARTICLE IV

(1) Each of the Parties shall, within one month after the date of the signature of this Agreement (Compromiso), appoint an Agent or Agents for the purposes of the Arbitration, who shall establish an address in the vicinity of the seat of the Court of Arbitration. The Parties shall communicate the names and addresses of their Agents to Her Britannic Majesty's Government, to the Court of Arbitration and to the other Party.

(2) If either of the Parties appoints more than one Agent, they shall be authorised to act jointly or severally.

ARTICLE V

(1) The Court of Arbitration shall, subject to the provisions of this Agreement (Compromiso) and after consultation with the Parties, settle its own Rules of Procedure and determine the order and dates of delivery of written pleadings and maps and all other questions of procedure, written and oral, that may arise. The fixing of the order in which these documents shall be presented shall be without prejudice to any question of any burden of proof.

2) El Secretario notificará a las Partes la dirección para la entrega de sus alegatos escritos y otros documentos.

ARTÍCULO VI

La Corte Arbitral podrá nombrar para que la asistan en su tarea los expertos que pueda requerir, a costa de las Partes.

ARTÍCULO VII

Las Partes darán a cualquiera de los Miembros de la Corte Arbitral, a cualquiera de los miembros de su personal y a los representantes autorizados de cualquiera de las Partes que hayan sido requeridos por la Corte Arbitral para acompañar a Miembros de esa Corte o de su personal, libre acceso a sus territorios, incluso cualquier territorio en disputa, en el entendido de que el otorgamiento de ese acceso no perjudicará en forma alguna los derechos de cualquiera de las Partes al dominio del territorio al cual, en el cual, a través de cual o sobre el cual tal acceso sea otorgado.

ARTÍCULO VIII

En el caso de que las Partes conjuntamente o la Corte Arbitral deseen un reconocimiento y levantamiento, aéreo o de otro tipo, para las finalidades del Arbitraje, este reconocimiento y levantamiento se hará bajo la dirección de la Corte Arbitral y a expensa de las Partes.

ARTÍCULO IX

La Corte Arbitral tendrá competencia para resolver sobre la interpretación y aplicación de este Acuerdo de Arbitraje (Compromiso).

(2) The Registrar shall notify to the Parties an address for the filing of their written pleadings and other documents.

ARTICLE VI

The Court of Arbitration may, at the expense of the Parties, appoint such experts as it may wish to assist it.

ARTICLE VII

The Parties shall give to any members of the Court of Arbitration and to any members of its staff, and to any authorised representatives of either Party who have been requested by the Court of Arbitration to accompany the members of the Court or its staff, free access to their territories, including any disputed territory, on the understanding that the grant of such access shall in no way prejudice the rights of either Party as to the ownership of any territory to, on, through or over which such access is granted.

ARTICLE VIII

In the event of the Parties jointly or the Court of Arbitration desiring a survey, by air or otherwise, for the purposes of the Arbitration, such survey shall be made under the guidance of the Court of Arbitration and at the expense of the Parties.

ARTICLE IX

The Court of Arbitration shall be competent to decide upon the interpretation and application of this Agreement (Compromiso).

ARTÍCULO X

Cada una de las Partes pagará sus propios gastos y la mitad de los gastos de la Corte Arbitral y de los del Gobierno de Su Majestad Británica, en relación con el Arbitraje.

ARTICLE X

Each of the Parties shall defray its own expenses and one half of the expenses of the Court of Arbitration and of Her Britannic Majesty's Government in relation to the Arbitration.

ARTÍCULO XI

1) En caso de muerte o incapacidad de cualquiera de los miembros de la Corte Arbitral, la vacante no será llenada a menos que las Partes acuerden lo contrario y el proceso continuará como si tal vacante no se hubiera producido.

2) En caso de muerte o incapacidad del Secretario, la vacante será llenada por la Corte Arbitral y el proceso continuará como si la vacante no se hubiera producido.

ARTICLE XI

(1) Should any member of the Court of Arbitration die or become unable to act, the vacancy shall not be filled unless the Parties agree otherwise, and the proceedings shall continue as if such vacancy had not occurred.

(2) Should the Registrar die or become unable to act, the vacancy shall be filled by the Court of Arbitration, and the proceedings shall continue as if such vacancy had not occurred.

ARTÍCULO XII

1) Concluido el proceso ante la Corte Arbitral, ésta transmitirá su decisión al Gobierno de Su Majestad Británica, incluyendo el trazado de la línea del límite en una carta.

2) La decisión resolverá definitivamente cada punto en disputa y establecerá las razones en las cuales se funda para resolverlo.

3) La decisión establecerá por quién, en qué forma y dentro de qué plazo ella será cumplida.

ARTICLE XII

(1) When the proceedings before the Court of Arbitration have been completed, it shall transmit its decision to Her Britannic Majesty's Government, which shall include the drawing of the boundary-line on a chart.

(2) The decision shall decide definitively each point in dispute and shall state the reasons for the decision on each point.

(3) The decision shall determine by whom, in what manner and within what time limit it shall be executed.

ARTÍCULO XIII

1) Si fuera sancionada la decisión a que se refiere el Artículo XII por el Gobierno de Su Majestad Británica, éste la comunicará a las Partes con la declaración de que esta decisión constituye la Sentencia de conformidad con el Tratado, la cual tendrá carácter definitivo de acuerdo con los Artículos XI y XIII de dicho Tratado.

2) La Sentencia será notificada a cada una de las Partes mediante su entrega en el domicilio en Londres de los Jefes de sus respectivas misiones diplomáticas.

ARTÍCULO XIV

La Sentencia será legalmente obligatoria para ambas Partes y será inapelable salvo lo dispuesto en el Artículo XIII del Tratado.

ARTÍCULO XV

La Corte Arbitral no cesará en sus funciones hasta que ella haya notificado al Gobierno de su Majestad Británica que, en opinión de la Corte Arbitral, se ha dado ejecución material y completa a la Sentencia.

ARTÍCULO XVI

La nominación de las Partes en orden alfabético empleada en este Acuerdo de Arbitraje (Compromiso), no importa prelación para ningun efecto.

ARTÍCULO XVII

Las Partes han informado al Gobierno de Su Majestad Británica que han aceptado el texto de este Acuerdo de Arbitraje (Compromiso).

ARTICLE XIII

(1) If the decision referred to in Article XII is ratified by Her Britannic Majesty's Government, they shall communicate it to the Parties with a declaration that such decision constitutes the Award in accordance with the Treaty, and that Award shall be final in accordance with Articles XI and XIII of the Treaty.

(2) The Award shall be communicated to each of the Parties by delivery to the London address of the Head of its Diplomatic Mission.

ARTICLE XIV

The Award shall be legally binding upon both the Parties and there shall be no appeal from it, except as provided in Article XIII of the Treaty.

ARTICLE XV

The Court of Arbitration shall not be *functus officio* until it has notified Her Britannic Majesty's Government that in the opinion of the Court of Arbitration the Award has been materially and fully executed.

ARTICLE XVI

The reference to the Parties in alphabetical order in this Agreement (Compromiso) shall not imply precedence for any purpose whatsoever.

ARTICLE XVII

The Parties have informed Her Britannic Majesty's Government that they have accepted the terms of this Agreement (Compromiso).

EN FE DE LO CUAL este Acuerdo de Arbitraje (Compromiso) ha sido firmado por representantes debidamente autorizados del Gobierno del Reino Unido de Gran Bretaña e Irlanda del Norte, del Gobierno de la República Argentina y del Gobierno de la República de Chile.

DADO en Londres el día 22 de julio de 1971, en idiomas español e inglés, siendo ambos textos igualmente auténticos, en un solo original que será depositado en los archivos del Gobierno Británico, quien transmitirá copias fieles y certificadas al Gobierno de la República Argentina, al Gobierno de la República de Chile y a la Corte Arbitral.

Por el Gobierno del Reino Unido de Gran Bretaña e Irlanda del Norte:

Joseph GODBER

Por el Gobierno de la República Argentina:

G. MARTÍNEZ-ZUVIRÍA

Por el Gobierno de la República de Chile:

Álvaro BUNSTER

IN WITNESS WHEREOF this Agreement (Compromiso) has been signed by the duly authorised representatives of the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the Argentine Republic and the Government of the Republic of Chile.

DONE at London the 22nd day of July, 1971, in the English and Spanish languages, both texts being equally authoritative, in a single original which shall be deposited in the archives of the Government of the United Kingdom, who shall transmit certified true copies to the Government of the Argentine Republic, to the Government of the Republic of Chile and to the Court of Arbitration.

For the Government of the United Kingdom of Great Britain and Northern Ireland:

Joseph GODBER

For the Government of the Argentine Republic:

G. MARTÍNEZ-ZUVIRÍA

For the Government of the Republic of Chile:

Álvaro BUNSTER

D. *Summary of the Proceedings*

Preliminary steps and written proceedings

Shortly after the signature of the *Compromiso*, and in compliance with Article IV (1) thereof, the Parties appointed Agents for the purposes of the Arbitration. The Government of the Argentine Republic appointed as its Agents His Excellency Señor Ernesto de la Guardia and His Excellency Señor Julio Barboza. The Government of the Republic of Chile appointed as its Agents His Excellency Señor Don Álvaro Bunster and His Excellency Señor Don José Miguel Barros, the former of whom resigned in September 1973.

Acting under Article III of the *Compromiso* the Court elected Sir Gerald Firzmaurice as its President.

At an informal meeting with the Parties held in London at the end of September 1971, various procedural matters were discussed, and it was decided, (*inter alia*) that English would be the language of the case, and that the written pleadings would be submitted in English.

In accordance with Article V of the *Compromiso*, the Court has, after consultation with the Parties, determined all other questions of procedure, written and oral, that have arisen, including the order and dates of the delivery of written pleadings, annexes and maps.

In conformity with Article III of the *Compromiso*, and by courtesy of the Swiss Federal and Geneva Cantonal authorities, the Court established its seat in the city of Geneva by an Order of 10 June 1972. By the same Order it fixed 1 January 1973 for the simultaneous deposit of the Parties' Memorials.

By an Order of 6 October 1972, Professor Philippe Cahier was appointed Registrar of the Court; and at the request of the Parties, the time-limit for the deposit of the Memorials was extended to 2 July 1973. The Memorials were duly delivered as ordered.

On 7 December 1973, the Court issued an Order fixing 2 July 1974 as the date for the deposit of the Counter-Memorials. At the request of the Agent of the Argentine Government, and with the consent of the Agent of the Government of Chile, the Court, by an Order of 22 July 1974, extended the time-limit for the deposit of the Counter-Memorials to 2 October 1974. These also were delivered on the due date.

On 29 November 1974 the Court held a meeting at The Hague with the representatives of the Parties to discuss with them certain procedural matters, —in particular the possibility of the delivery of Replies, and of a visit by the Members of the Court to the Beagle Channel region.

By an Order of 20 December 1974 the Court fixed 1 July 1975 as the date for the delivery of the Replies, and these were forthcoming on that date.

Visit to the disputed region

At the request of both Parties all the Members of the Court, accompanied by the Registrar and Liaison Officers from both sides, visited the Beagle Channel region during the first fortnight of March 1976, and inspected the islands and waterways concerned, first on the Chilean Naval Transport Vessel "Aquiles", and then on the Argentine Naval Transport Vessel "Bahia Aguirre". Every possible assistance and facility was afforded by the personnel of both Navies and by the individual representatives of the Parties participating in the expedition.

The Court subsequently fixed 7 September 1976 as the date for the opening of the oral proceedings, —and on 29 July the Parties, with the sanction of the Court, deposit a number of additional documents.

The oral proceedings

The formal opening of the oral proceedings took place on 7 September 1976 in the Alabama Room of the Hôtel de Ville, Geneva, by arrangement with the authorities concerned, and was attended by representatives of the Arbitrator Government, the Parties, the Swiss federal and cantonal authorities and of the International Labour Office in whose premises the working meetings were to be held. After a speech of welcome by Mr. Jacques Vernet, Conseiller d'Etat, Head of the Department of Public Works of the Canton of Geneva, the President declared the oral proceedings open and made a general explanatory statement (reproduced as No. 1 in Annex V hereto), which was followed by statements delivered by the Agents of the Parties.

Thereafter, starting on 8 September and finishing on 23 October, the hearings took place in the premises of the International Labour Organisation. During this period two rounds of addresses were presented on behalf of each Party, Chile starting each round (by arrangement between the Parties), and Argentina finishing; with statements by, on behalf of Chile, His Excellency Señor Don José Miguel Barros, as Agent, and Professors Weil and Brownlie, as Counsel, —and on behalf of Argentina, their Excellencies Señor Ernesto de la Guardia and Julio Barboza, as Agents, and Professor Ago, Jennings and Reuter as counsel. Statements were delivered in English or French at the Speaker's choice, a simultaneous translation into English being provided in the latter case.

At the conclusion of the oral hearings the Court requested the Parties to furnish it with further written observations on certain matters dealt with in one of the final statements made on behalf of Argentina. These were deposited, respectively, on 3 November (Chile) and 16 November (Argentina)—the dates specified by the Court.

After a valedictory statement by the President, the text of which is reproduced as No. 2 in Annex V hereto, the oral proceedings were declared closed. As regards the Court's deliberation, see Section F below.

E. *Formal Submissions of the Parties*

In the Memorials

On behalf of the Government of the Argentine Republic

The Argentine Republic

. . . . . .

concludes and maintains that the boundary line between the respective maritime jurisdictions of the Argentine Republic and of the Republic of Chile from meridian 68°36′38.5″ W. of Greenwich runs along the median line of the Beagle Channel, deviating from that line only where inflexions are necessary so that each country may always navigate in waters of its own; and that the line therefore runs equidistant from Islas Bridges and Islote Bartlett, and then equidistant from Islotes Les Eclai-

reurs and the northern coast of Isla Navarino as far as Banco Herradura where it turns to follow a middle course between Banco Herradura and Banco Gable (thus avoiding obstacles to navigation); thence it continues a middle course through Paso Mackinlay, and then between Isla Martillo and Islotes Gemelos; thereafter, returning to the median line of the Beagle Channel, the boundary continues south-eastwards along the course of the Beagle Channel, with Isla Navarino on one side and the islands and islets Snipe, Solitario, Hermanos and Picton, successively on the opposite side; it continues along the median line of the Beagle Channel between Isla Picton and Isla Navarino, reaching a point equidistant from the eastern coast of Isla Navarino, the southernmost coast of Isla Picton and the northern coast of Isla Lennox, whence it follows along the median line of Paso Goree, to reach the open sea mid-way between Punta Guanaco on Isla Navarino and Punta Maria on Isla Lennox; from there it continues in a generally southerly direction.

Therefore, for all the reasons stated in this Memorial, and for any other reason that the Court might deem relevant to the present case, the Argentine Republic submits that the Court of Arbitration should decide and declare that:

(*a*) the boundary-line between the respective maritime jurisdictions between the Argentine Republic and the Republic of Chile, from meridian 68°36′38.5″ W., within the region referred to in paragraph (4) of Article I of the Agreement for Arbitration, is as described above;

(*b*) that in consequence, Picton, Nueva and Lennox Islands and adjacent islands and islets belong to the Argentine Republic.

On behalf of the Government of the Republic of Chile:

Reserving its right to supplement or amend its request, should the need arise in the light of the Argentine pleadings, the Government of Chile accordingly request the Court of Arbitration to decide in favour of Chile the questions referred to in paragraph (2) of Article 1 of the Agreement for Arbitration (Compromiso) dated 22 July 1971 and to make the declarations therein set out.

In the Counter-Memorials

On behalf of the Government of the Argentine Republic:

No further formal Submissions were presented.

On behalf of the Government of the Republic of Chile:

For the reasons set out at length in the Chilean Memorial and this Counter-Memorial, and reserving the right to amend or supplement its request, the Government of Chile formally

(i) renews the request made in paragraph 3 at p. 176 of the Chilean Memorial and

(ii) requests the Court of Arbitration to reject the requests made by the Government of Argentina at p. 446 of its Memorial.

In the Replies

On behalf of the Government of the Argentine Republic:

The Argentine Government maintains the position and submissions as presented in its *Memorial* and *Counter-Memorial* and respectfully asks the Court to reject the Chilean submissions made in p. 151 of its *Counter-Memorial.*

On behalf of the Government of the Republic of Chile:

For the reasons set out at length in the Chilean Memorial and Counter-Memorial, together with this Reply, and reserving the right to amend or supplement its request, the Government of Chile formally confirms the submissions presented at the conclusion of its Memorial and Counter-Memorial, and thus (i) maintains the request made in paragraph 3 at p. 176 of the Chilean Memorial; and (ii) renews the request of the Chilean Counter-Memorial (at p. 151) that the Court of Arbitration reject the requests made by the Government of Argentina at p. 446 of its Memorial and maintained at p. 541 of its Counter-Memorial.

At the end of the oral proceedings

On behalf of the Government of the Argentine Republic:

At the hearing of 23 October 1976:

The Argentine Government concludes and maintains that the boundary line between the respective maritime jurisdictions of the Argentine Republic and of the Republic of Chile, from the intersection of meridian 68°36′38.5″W. of Greenwich with the Beagle Channel is a line which follows that same meridian until the middle of the Beagle Channel and then runs along the median line of the Channel, deviating from that line only where inflections are necessary so that each country may always navigate in waters of its own. The line thus runs equidistant between Isla Grande de Tierra del Fuego and Islas Hoste and Navarino, passes between Islas Bridges and Islote Bartlett, and then runs equidistant from Islotes Les Eclaireurs and the northern coast of Isla Navarino. It continues along the median line of the Channel, as far as the vicinity of Banco Herradura, where it turns to follow the middle of the navigable channel between Banco Herradura and Isla Grande and between Banco Herradura and Banco Gable; thence it continues along the navigable channel through Paso Mackinlay and then returns to the median line passing between Isla Martillo and Islotes Gemelos. Thereafter, the boundary continues along the median line of the Beagle Channel, first between Isla Navarino and Isla Grande and then between Navarino on the one side and the islands and islets of Snipe, Solitario, Hermanos and Picton, successively on the opposite side. The line continues along the median line of the Beagle Channel between Isla Picton and Isla Navarino, and thereafter reaches a point equidistant from the eastern coast of Isla Navarino, the south-westernmost point of Picton and the northern coast of Lennox, whence it follow along the median line of Rada Goree

(avoiding obstacles for navigation), to reach the open sea midway between Punta Guanaco on Isla Navarino and Punta María on Isla Lennox. From there it continues in a southerly direction.

Therefore, for all reasons stated in the Argentine written and oral pleadings, and for any other reason that the Court might deem relevant to the present case, the Argentine Republic submits that the Court of Arbitration should decide and declare that:

(*a*) the boundary line between the respective maritime jurisdictions between the Argentine Republic and the Republic of Chile, from meridian 68°36′38.5″W., within the region referred to in paragraph (4) of Article 4 of the Agreement for Arbitration, is as described above;

(*b*) that in consequence, Picton, Nueva and Lennox Islands and adjacent islands and islets belong to the Argentine Republic.

On behalf of the Government of the Republic of Chile:

At the hearing of 14 October 1976:

In accordance with the *Compromiso* dated 22 July 1971, and in the light of the written and oral argument of the Government of Chile and of the evidence adduced, and in relation to the question submitted to Her Britannic Majesty's Government concerning the interpretation of the Boundary Treaty of 23 July 1881;

The Republic of Chile requests the Court of Arbitration to decide:

First that Picton, Nueva and Lennox Islands, and the islands and islets adjacent to them, belong to the Republic of Chile; and

Second that the other islands and islets included in the list sent to the Registrar with letter No. 131 dated 20 September 1976 and described therein as appurtenant "to the Southern shore", belong to the Republic of Chile; but, should this second submission not be accepted by the Court, then, as an alternative, that all the other islands and islets whose entire land surface is situated wholly within the region referred to in Article I (4) of the *Compromiso* dated 22 July 1971, belong to the Republic of Chile.

F. *The Court's Deliberation*

The Court started its deliberations soon after the oral hearings were terminated on 23 October 1976.

It wishes in the first place to express its great appreciation for the help it has received from the Parties throughout the proceedings, in the form of written and oral statements, documentation, and cartography that have been in conformity with the highest professional standards.

Secondly, having regard to the sudden and greatly regretted decease of one of its Members, Judge Sture Petrén on 13 December, the

Court wishes to state that its deliberation was by then completed on all essential aspects of the case, including the conclusions to be reached; that Judge Petrén had taken part in the whole deliberation up to that date; that he had, like other Members of the Court, already placed his views on record in the form of a written Note and other statements; and had also participated throughout the first reading of the text of the Decision. In addition he took part in the work of preparing the tracing of the eventual boundary-line—see Part II below, paragraphs 103-110.

These facts are set out here having regard to the statement in the *dispositif* of the Decision that it was arrived at by unanimity.

The Decision itself now follows in Part II.

PART II: DECISION OF THE COURT OF ARBITRATION
(*Compromiso*, Article XII (1))

I. *Scope and Geography of the Dispute and Task of the Court*

1. The dispute between the Republics of Argentina and Chile to which the present decision relates, concerns the territorial and maritime boudaries between them, and the title to certain islands, islets and rocks near the extreme end of the South American continent, in the region of what can conveniently be called in general terms that of the eastern Beagle Channel—a seaway described in paragraph 4 below. For the purposes of the dispute the confines of this region are derived from the co-ordinates specified in Article I (4) of the *Compromiso* set out in Section C of Part I (Report) above, —which are shown by the straight lines joining the six points ABCDEF on the annexed Map A. On account of the resulting shape of the area thus bounded, it has come to be known in the course of the case as the "Hammer". With respect to territory or waters outside this area the Court has no competence to adjudicate.

2. However, even with reference to what is within the area of the Hammer, the Parties have each framed differently their requests for a decision. These are respectively set out as follows in paragraphs (1) and (2) of the Arbitration Agreement (*Compromiso*) the text of which will be found in Section C of Part I (Report) above: —

> (1) The Argentine Republic requests the Arbitrator to determine what is the boundary-line between the respective maritime jurisdictions of the Argentine Republic and of the Republic of Chile from meridian 68°36′38.5″ W., within the region referred to in paragraph (4) of this Article, and in consequence to declare that Picton, Neuva and Lennox Islands and adjacent islands and islets belong to the Argentine Republic.
>
> (2) The Republic of Chile requests the Arbitrator to decide, to the extent that they relate to the region referred to in paragraph (4) of this Article, the questions referred to in her Notes of

11 December 1967 to Her Britannic Majesty's Government and to the Government of the Argentine Republic and to declare that Picton, Lennox and Nueva Islands, the adjacent islands and islets, as well as the other islands and islets whose entire land surface is situated wholly within the region referred to in paragraph (4) of this Article, belong to the Republic of Chile.

The text of the Notes of 11 December 1967, referred to in the Chilean request above quoted is given in Annex I hereto, except for their annexes lettered B to D which are no longer of any direct relevance. These Notes do not, in any case, appear to the Court substantially to modify the character of the issues it is now called upon to deal with, —a view which was endorsed by the Chilean Agent in the course of the oral pleadings (Verbatim Record, VR/25, p. 3). The meridian 68°36'38.5" W. mentioned in the Argentine request is the meridian constituting the boundary between the respective territories of the Parties on the Isla Grande[1] of Tierra del Fuego (see Map B). This perpendicular boundary, which meets the Beagle Channel at the point near Lapataia marked X on that map, and which ends there, is not, as such, in dispute between the Parties, although in other respects more will be said of it hereafter.

3. The islands of Picton, Nueva and Lennox, specifically indicated in the requests of both Parties, which it will be convenient to designate collectively as the PNL group, or as the disputed (or the three) islands, are situated at the eastern end of the Beagle Channel where it meets the sea. Before it finally does so, however, the presence of these three islands causes it to divide in the manner described in the footnote below[2] (and see also paragraph 4). This has given rise to the question concerning the interpretation to be attributed to such expressions as "south" or "to the south" of the Beagle Channel, which has been one of the principal factors leading to the present dispute. It does not, however, as will be explained later, follow from this that the Court is called upon the define objectively, and in the physical or geographical sense, which of the eastern arms of the Channel is to be considered as being the principal one, or as constituting the so to speak "true" Beagle Channel, although a definition for the purposes of settling the dispute will result from the Court's decision.

4. The Beagle Channel itself, situated near the southern extremity of South America, about 70 miles (112 km.) north of Cape Horn, is named after the British Naval Survey sloop "Beagle", in the course of whose voyages in the period 1831-34 the Channel's existence was

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[1] This is the very large island, roughly triangular in shape, the approximate apex points of which consist of Cape Espíritu Santo in the north, at the Atlantic end of the Straits of Magellan; Cape San Diego near Staten Island, in the east; and Peninsula Brecknock on the Pacific side, in the west.

[2] The actual division is at Picton Island. Once abreast of, or past, Picton, there is a choice of courses out of either arm, —passing in the case of the northern arm, either north or south of Nueva Island; or, in the case of the southern arm, either east or west of Lennox Island (see Maps generally).

first definitely established. It is a narrow seaway, averaging about 3 to 3.5 miles (4.8 to 5.6 km.) in breadth, and with a total length that can variously be estimated as 120-150 miles (192-240 km.) according to the selected starting and finishing points. Connecting ocean with ocean, it begins at its western end with two arms that respectively pass north and south of Isla Gordon and continue eastward after meeting at Point Divide on the eastern point of that island. It then proceeds in a shallow arc (yet in a basically horizontal line) until a point about 4 miles (6.4 km.) short of Picton Island, after which it divides as already mentioned. One arm, considered by Chile to constitute the real prolongation of the Channel to the sea, continues in the same easterly direction but curving towards the east-south-east, and passes north of Picton Island, between it and the Isla Grande south shore[3], past Cape San Pío on that shore, to meet the sea at a line the exact location of which has been a good deal debated in the case but which (within the limits of the "Hammer") could not be put further than the one which would join a point about a mile west of Punta Jesse on the Isla Grande to Punta Oriental at the eastern extremity of Nueva Island. The other arm, considered by Argentina to be the real eastern course of the Channel, departs from the latter's previous general west-east direction and describes what gradually grows into almost a right-angled turn, to pass south and west of Picton Island, between it and Navarino Island, and thence between the latter and Lennox Island in what has become a general north-south direction, or even (when abreast of Lennox Island) a south-westerly one, reaching the sea between Punta María on that island and Punta Guanaco on Navarino. These details, which can be better appreciated from the annexed Maps A and B, are mentioned so that the geographical situation may be clear.

5. There is, however, a different possible perspective in which the geography of the eastern end of the Beagle Channel can be viewed, according to which its two arms at this end would not be parts of the Channel itself but simply entries to or exists from it, the actual Channel only starting (or stopping) west of Picton Island. This aspect of the matter, for reasons that will become obvious, has not formed part of the case of either Party, and at this stage the Court merely mentions it without, for the moment, making any further comment.

6. The respective requests of the Parties for consideration by the Court, as set out in paragraph 2 above, theoretically represent separate approaches, or a difference in the way each Party views the problem, —but the Court believes that, as regards what it has to decide, no real difference of substance is in practice involved. Both requests raise in terms the question of title to the islands of the PNL group, and both are so framed as to cover the question of title to the smaller islands, islets and rocks which have come to be known in the case as "the small islands in [or within] the Channel", —that is to say those situated along

[3] This shore, from Capes San Diego and Buen Suceso in the east, to Peninsula Brecknock in the west, forms the base of the Isla Grande triangle—see n. ([1]) above.

its course from Point X near Lapataia (*supra*, paragraph 2) to the western extremity of Picton Island, and thereafter in its two eastern branches but still within the "Hammer". The two different approaches adopted by the Parties, *i.e.* the "maritime" (Argentina) and the "territorial" (Chile), appear to the Court to lead to much the same thing. Title to territory automatically involves jurisdiction over the appurtenant waters and continental shelf and adjacent submarine areas, —to such extent, in such manner, and within such distances from the shore, as may be recognized by the applicable rules of international law. On the other hand, there are no signposts or frontiers in the sea as such, —"maritime jurisdiction" does not exist as a separate concept divorced from dependence on territorial jurisdiction. To draw a boundary between the maritime jurisdiction of States, involves first attributing to them, or recognizing as being theirs, the title over the territories that generate such jurisdiction. But this once done, the maritime jurisdiction will follow from general principles of law which, to save unnecessary complication need not be particularized, but which will enter into the determination of the boundary line that, as part of its decision, the Court is bidden by Article XII (1) of the *Compromiso* to draw on a chart—(*supra*, Part I, Section C).

7. The task of the Court is further defined in a number of ways which are of importance for reaching a correct solution of the questions before it: —

(*a*) under Article I (7) of the *Compromiso* the Court must "reach its conclusions in accordance with the principles of international law";

(*b*) the Court has no power under the *Compromiso* or otherwise to reach a conclusion *ex aequo et bono*;

(*c*) both Parties, though not perhaps with the same degree of emphasis, regard the PNL group as an indivisible whole for the purpose of determining title to the islands concerned, —and the Court takes note of this attitude without considering itself as necessarily bound by it, should juridical considerations otherwise require;

(*d*) it was common ground between the Parties, though subject to certain different shades of interpretation: —

(i) that their rights in respect of the disputed area, and in particular of the PNL group, are governed exclusively by the Boundary Treaty ("*Tratado de Límites*") signed between them on 23 July 1881 (the 1881 Treaty)—the text of which is given in paragraph 15 below—according to its correct interpretation in the light of the principles now enshrined in Articles 31-33 of the Vienna Convention of 1969 on the Law of Treaties;

(ii) that the Boundary Treaty of 1881 was intended to provide, and must be taken as constituting, a complete, de-

finitive and final settlement of all territorial questions still outstanding at that time, so that nothing thereafter remained intentionally unallocated, even if detailed demarcations of boundaries on the ground were left over to be carried out later, or particular differences of interpretation might still require to be resolved;

(iii) that in consequence, the régime created by the 1881 Treaty, whatever it was, superseded and replaced all previous territorial arrangements or understandings between the Parties, together with any former principles governing territorial allocation in Spanish-America, —subject (at least in the opinion of one of the Parties) to the continuing relevance of those arrangements, understandings or principles for purposes of interpreting the 1881 régime, —see *infra*, paragraph 21.

8. With regard to the last three of the above-stated propositions —those numbered (i), (ii) and (iii) respectively—the Court would observe that, while it has taken note of the Parties' wish to avoid any failure of allocation, it must also, if it deems it necessary for the exercise of its judicial function of deciding in accordance with international law, be entitled to have recourse to any valid and relevant juridical considerations lying outside the Treaty, in order duly to accomplish its mandate of responding to the requests of the Parties as set out in Article I, paragraphs (1) and (2) of the *Compromiso—supra*, paragraph 2).

II. *Preliminary Historical Considerations*

9. Before coming to the Treaty of 1881, the Court thinks it necessary to refer to certain of the pre-1881 historical elements that serve to explain the structure of the Treaty and may be relevant to its interpretation. Speaking in very general terms, it appears to the Court that, previous to 1881, and subject to wide divergencies of interpretation and application, the Parties were agreed in principle that their rights in the matter of claims or title to territory were governed *prima facie* (and if no recognized basis of derogation existed) by the doctrine of the *uti possidetis juris of 1810*. This doctrine—possibly, at least at first, a political tenet rather than a true rule of law—is peculiar to the field of the Spanish-American States whose territories were formerly under the rule of the Spanish Crown, —and even if both the scope and applicability of the doctrine were somewhat uncertain, particularly in such far-distant regions of the continent as are those in issue in the present case, it undoubtedly constituted an important element in the inter-relationships of the continent.

10. As the Court understands the matter, the doctrine has two main aspects. First, all territory in Spanish-America, however remote or inhospitable, is deemed to have been part of one of the former administrative divisions of Spanish colonial rule (vice-royalties, captaincies-general, etc.). Hence there is no territory in Spanish-America that has

the status of *res nullius* open to an acquisition of title by occupation. *Secondly*, the title to any given locality is deemed to have become automatically vested in whatever Spanish-American State inherited or took over the former Spanish administrative division in which the locality concerned was situated (*uti possidetis, ita possideatis*, —the full formula). Looked at in another way, *uti possidetis* was a convenient method of establishing the boundaries of the young Spanish-American States on the same basis as those of the old Spanish administrative divisions, except that the latter were themselves often uncertain or ill-defined or, in the less accessible regions, not factually established at all, —or again underwent various changes.

11. However, the Court considers that it is no part of its task to pronounce on what would have been the rights of the Parties on the basis of the *uti possidetis juris* of 1810 because, in the first place, these rights—whatever they may have been—are supposed to have been overtaken and transcended by the regime deriving from the 1881 Treaty, —see paragraph 7 (*d*) (iii) above. But secondly, it seems that, previous to this date, each of the Parties was, by virtue of *uti possidetis*, claiming, or had at various times claimed, most of the continent south of the Río Negro and east of the Andes, down to the far south, —except that, as was only to be expected, the main emphasis of these claims was placed, by Argentina, on the Atlantic seaboard, and by Chile on the Pacific seaboard in the southern regions where the Cordillera of the Andes died away and no longer provided a natural boundary. Thus was adumbrated the so-called "Oceanic" principle, which itself—so it was claimed—derived from *uti possidetis*. At the same time both Parties also laid claims of sorts to, or in, large areas of the interior, —that is to say continental Patagonia, the Magellanic region, Tierra del Fuego and the Fuegian islands. As will appear later, the Court does not think it necessary to attempt to evaluate the respective merits of these claims, as they stood at that time.

12. The unsatisfactory or at least indeterminate nature of claims based on *uti possidetis*, given the existence of rival claims, similarly based, seems to have been tacitly recognized by both the Parties themselves, —for in 1855 after various incidents and controversies, they decided in effect to "freeze" their respective claims by means of a special territorial clause in what was otherwise mainly a commercial treaty—the Treaty of Peace, Friendship, Commerce and Navigation signed between them in Santiago on 30 August of that year. By Article 39 of this Treaty, the Parties, while recognizing

> as the boundaries of their respective territories those existing at the time when they broke away from Spanish dominion in the year 1810,

made no attempt to define what those boundaries were, but instead agreed

> to defer the questions that have arisen or *may arise* regarding this matter [stress added] in order to discuss them later... and in case of not being able to reach a complete agreement, to submit the decision to arbitration of a friendly nation.

The next following provision of this Treaty, Article 40, in effect "entrenched" its Article 39 by providing a right of denunciation to be exercisable only in respect of those clauses that related to commerce and navigation. It is in consequence of this that Article 39 of the Treaty has never been formally denounced, —but its requirements in respect of boundaries became satisfied when the agreement it referred to was reached on the basis of the Treaty of 1881, so that, within the limits of the Treaty area, it was thenceforth an executed, and no longer an executory provision. Moreover, in so far as Article 39 involved an obligation to negotiate, this was replaced by Article VI of the 1881 Treaty—(for text, see paragraph 15 below).

13. Until the discussions, starting in 1876, that resulted in the Treaty of 1881, all attempts to implement the intention of Article 39 of the 1855 Treaty in respect of boundaries had come to nothing. Negotiations for a boundaries agreement, such as those that took place in 1865, and again in 1872-1873, proved abortive, as also did proposals for settlement by arbitration considered in 1874. Throughout, both countries maintained (at least on paper) their claims from the Río Negro down to the far south. But in about 1874-1875, incidents[4] leading to conflicting claims to exercise jurisdiction, and mutual accusations of violation of the *status quo* established by Article 39 of the 1855 Treaty, seem to have given the two Governments pause, for it was in the following year, 1876, that negotiations of a more serious character, ending eventually in success, were embarked upon and led to the Treaty of 1881.

14. The Court will, so far as necessary, consider the 1876-1881 negotiations in connexion with the 1881 Treaty that resulted from them, —for these negotiations are naturally of significance mainly if not wholly for the light they may shed on the meaning of the text of the Treaty itself. However, before setting out this text, to which the Court is now coming, it will be helpful to state what were the four main regions concerning which the claims of the Parties were in conflict prior to 1881, but were supposed to be settled, by the Treaty of that year. These regions were (1) that part of Patagonia (bounded on the west by the main chain of the Andes) that stretched from the Río Negro down to a (then) undetermined line north of the Straits of Magellan; (2) the Magellanic area, *i.e.* the Straits of Magellan and the territory and islands bordering these immediately to the north and south; (3) the rest of the Isla Grande of Tierra del Fuego, with Staten Island (Isla de los Estados) off its extreme south-eastern end; and finally (4), the Fuegian islands or archipelago, sometimes known as the Cape Horn archipelago, to the south, south-west and west of the Isla Grande.

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[4] See Chilean Annexes 16-19; and also pp. 11, 24 *et seq.*, 107, and 109-110 of the text described in n. 60 below of the speech of Señor Irigoyen, the Argentine Foreign Minister, made at the date of the conclusion of the 1881 Treaty—(see *infra*, paragraph 113). There were incidents relating to the Straits of Magellan and the Rivers Gallegos and Santa Cruz, —Argentine and Chilean warships were involved, —a lighthouse, —and also foreign ships, the "Devonshire" (American), "Jeanne-Amélie" (French), and "Elgiva" (British).

III. *The Treaty of 1881*

A. Preliminary matters

(1) *General considerations*

15. In accordance with the traditional canons of treaty interpretation now enshrined in the Vienna Convention on the Law of Treaties, which (see paragraph 7 (*d*) (i) above) both the Parties have accepted as governing the matter, the Court will next proceed to consider what is the effect of the Treaty of 1881, interpreted "in good faith" and "in accordance with the ordinary meaning to be given to [its] terms ... in their context and in the light of its object and purpose"—(Vienna Convention, Article 31). This involves in the first place an analysis of the text of the Treaty, which was entitled "*Tratado de Límites*" (Boundary Treaty). This is set out in full below, the English translation side by side with the Spanish original, because the latter is the only authentic version and also because doubts have arisen here and there as to what exactly should be considered the correct English rendering[5]:

TRATADO DE LÍMITES	BOUNDARY TREATY
	(*23 July 1881*)
En nombre de Dios Todopoderoso. Animados los Gobiernos de la Répública de Chile y de la República Argentina del propósito de resolver amistosa y dignamente la controversia de límites que ha existido entre ambos países, y dando cumplimiento al articulo 39 del Tratado de Abril del año 1856, han resuelto celebrar un Tratado de límites y nombrado a este efecto sus Plenipotenciarios, a saber:	In the name of Almighty God. The Governments of the Republic of Chile and of the Argentine Republic, desirous of terminating in a friendly and dignified manner the boundary controversy existing between the two countries, and giving effect to Article XXXIX of the Treaty of April, 1856, have decided to conclude a Boundary Treaty, and have for this purpose named their Plenipotentiaries as follows:
S. E. el Presidente de la República de Chile, a Don Francisco de B. Echeverría, Cónsul General de aquella República.	His Excellency the President of the Republic of Chile, Don Francisco de B. Echeverría, Consul-General of that Republic;
S. E. el Presidente de la República Argentina, al Doctor Don Bernardo de Irigoyen, Ministro Secretario de Estado en el Departamento de Relaciones Exteriores.	His Excellency the President of the Argentine Republic, Dr. Don Bernardo de Irigoyen, Secretary of State for Foreign Affairs.

[5] Each side has furnished its own English version, and these do not always quite correspond. The Chilean is used here because it was supplied to the Court in a convenient, self-contained form, —but where material differences of translation exist in relevant contexts, these are commented upon in the appropriate place.

Quienes, después de haberse manifestado sus plenos poderes y encontrándolos bastantes para celebrar este acto, han convenido en los artículos siguientes:

Artículo I

El límite entre Chile y la República Argentina es de Norte a Sur, hasta el paralelo cincuenta y dos de latitud, la Cordillera de los Andes. La línea fronteriza correrá en esa extensión por las cumbres más elevadas de dichas Cordilleras que dividan las aguas y pasará por entre las vertientes que se desprenden a un lado y otro; las dificultades que pudieran suscitarse por la existencia de ciertos valles formados por la bifurcación de la Cordillera y en que no sea clara la línea divisoria de las aguas, serán resueltas amistosamente por dos peritos nombrados uno de cada parte. En caso de no arribar éstos a un acuerdo, será llamado a decidirlas un tercer perito designado por ambos Gobiernos. De las operaciones que practiquen se levantará un acta en doble ejemplar, firmada por los dos peritos, en los puntos en que hubieren estado de acuerdo y además por el tercer perito en los puntos resueltos por éste. Esta acta producirá pleno efecto desde que estuviere suscrita por ellos y se considerará firme y valedera sin necesidad de otras formalidades o trámites. Un ejemplar del acta será elevado a cada uno de los Gobiernos.

Artículo II

En la parte Austral del Continente y al Norte del Estrecho de Magallanes, el límite entre los dos países será una línea que, partiendo de Punta Dungeness, se prolongue

These Representatives, after exchanging their full powers, and finding the same sufficient for the purpose of this act, have agreed upon the following Articles:

Article I

The boundary between Chile and the Argentine Republic is from north to south, as far as the 52nd parallel of latitude, the Cordillera de los Andes. The boundary-line shall run in that extent over the highest summits of the said Cordilleras which divide the waters, and shall pass between the sources (of streams) flowing down to either side. The difficulties that might arise owing to the existence of certain valleys formed by the bifurcation of the Cordillera, and where the water divide should not be clear, shall be amicably solved by two Experts, appointed one by each party. Should these fail to agree, a third Expert, selected by both Governments, will be called in to decide them. A Minute of their proceedings shall be drawn up in duplicate, signed by the two Experts on those points upon which they should be in accord, and also by the third Expert on the points decided by the latter. This Minute shall have full force from the moment it is signed by the Experts, and it shall be considered stable and valid without the necessity of further formalities or proceedings. A copy of such Minute shall be forwarded to each of the Governments.

Article II

In the southern part of the Continent, and to the north of the Straits of Magellan, the boundary between the two countries shall be a line which, starting from Point

por tierra hasta Monte Dinero; de aquí continuará hacia el Oeste, siguiendo las mayores elevaciones de la cadena de colinas que allí existen, hasta tocar en la altura del Monte Aymond. De este punto se prolongará la línea hasta la intersección del meridiano setenta con el paralelo cincuenta y dos de latitud y de aquí seguirá hacia el Oeste coincidiendo con este último paralelo hasta el *divortia aquarum* de los Andes. Los territorios que quedan al Norte de dicha línea pertenecerán a la República Argentina, y a Chile los que se extiendan al Sur, sin perjuicio de lo que dispone respecto de la Tierra del Fuego e islas adyacentes el artículo tercero.

Dungeness, shall be prolonged by land as far as Monte Dinero; from this point it shall continue to the west, following the greatest altitudes of the range of hillocks existing there, until it touches the hill-top of Mount Aymond. From this point the line shall be prolonged up to the intersection of the 70th meridian with the 52nd parallel of latitude, and thence it shall continue to the west coinciding with this latter parallel, as far as the divortia aquarum of the Andes. The territories to the north of such a line shall belong to the Argentine Republic, and to Chile those extending to the south of it, without prejudice to what is provided in Article III, respecting Tierra del Fuego and adjacent islands.

Artículo III

En la Tierra del Fuego se trazará una línea que, partiendo del punto denominado Cabo del Espíritu Santo en la latitud cincuenta y dos grados cuarenta minutos, se prolongará hacia el Sur, coincidiendo con el meridiano occidental de Greenwich, sesenta y ocho grados treinta y cuatro minutos hasta tocar en el canal "Beagle". La Tierra del Fuego, dividida de esta manera, será chilena en la parte occidental y argentina en la parte oriental. En cuanto a las islas, pertenecerán a la República Argentina la isla de los Estados, los islotes próximamente inmediatos a ésta y las demás islas que haya sobre el Atlántico al Oriente de la Tierra del Fuego y costas orientales de la Patagonia; y pertenecerán a Chile todas las islas al Sur del canal "Beagle" hasta el Cabo de Hornos y las que haya al occidente de la Tierra del Fuego.

Article III

In Tierra del Fuego a line shall be drawn, which starting from the point called Cape Espíritu Santo, in parallel 52°40′, shall be prolonged to the south along the meridian 68°34′ west of Greenwich until it touches Beagle Channel. Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentine on the eastern. As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego.

Artículo IV

Los mismos peritos a que se refiere el artículo primero fijarán en el terreno las líneas indicadas en los dos artículos anteriores y procederán en la misma forma que allí se determina.

Artículo V

El Estrecho de Magallanes queda neutralizado a perpetuidad y asegurada su libre navegación para las banderas de todas las naciones. En el interés de asegurar esta libertad y neutralidad no se construirán en las costas fortificaciones ni defensas militares que puedan contrariar ese propósito.

Artículo VI

Los Gobiernos de Chile y de la República Argentina ejercerán pleno dominio y a perpetuidad sobre los territorios que respectivamente les pertenecen según el presente arreglo.

Toda cuestión que, por desgracia, surgiere entre ambos países, ya sea con motivo de esta transacción ya sea de cualquiera otra causa, será sometida al fallo de una Potencia amiga, quedando en todo caso como límite inconmovible entre las dos Repúblicas el que se expresa en el presente arreglo.

Artículo VII

Las ratificaciones de este Tratado serán canjeadas en el término de sesenta días, o antes si fuese posible, y el canje tendrá lugar en la ciudad de Buenos Aires o la de Santiago de Chile.

Article IV

The Experts referred to in Article I shall mark out on the ground the lines indicated in the two preceding Articles, and shall proceed in the manner therein indicated.

Article V

The Straits of Magellan shall be neutralized for ever, and free navigation assured to the flags of all nations. In order to assure this freedom and neutrality, no fortifications or military defences shall be constructed on the coasts that might be contrary to this purpose.

Article VI

The Governments of Chile and the Argentine Republic shall perpetually exercise full dominion over the territories which respectively belong to them according to the present arrangement.

Any question which may unhappily arise between the two countries, be it on account of the present Arrangement, or be it from any other cause whatsoever, shall be submitted to the decision of a friendly Power; but, in any case, the boundary specified in the present Agreement will remain as the immovable one between the two countries.

Article VII

The ratifications of the present Treaty shall be exchanged within the period of sixty days, or sooner if possible, and such exchange shall take place in the city of Buenos Ayres or in that of Santiago de Chile.

EN FE DE LO CUAL los Plenipotenciarios de la Republica de Chile y de la República Argentina firmaron y sellaron con sus respectivos sellos y por duplicado el presente Tratado en la ciudad de Buenos Aires a los veintitrés días del mes de julio del año de Nuestro Señor mil ochocientos ochenta y uno.

IN TESTIMONY OF WHICH the Plenipotentiaries of the Republic of Chile and of the Argentine Republic have signed and sealed with their respective seals, and in duplicate, the present Treaty, in the city of Buenos Ayres, on the 23rd day of the month of July, in the year of our Lord 1881.

Francisco DE B. ECHEVERRÍA (L.S.)

Bernardo DE IRIGOYEN (L.S.)

Francisco DE B. ECHEVERRÍA (L.S.)

Bernardo DE IRIGOYEN (L.S.)

* * *

16. There is one general consideration of major importance affecting the interpretation of the Treaty of 1881 as a whole, particularly as regards its structure, to which attention should be drawn at the outset. Like most treaties, it represented a compromise between the different and often directly conflicting claims of the Parties. Neither Party obtained all it wanted, but each obtained what it wanted most, at the sacrifice of something (to it) less important. That this was so, and that the Treaty was to be seen in this light, has been more or less common ground between the Parties, although they have differed in their views concerning the nature of the compromise and what was to be deemed to enter into it. This will be further discussed in the context of the provisions of the Treaty now to be considered.

17. For this purpose the Court will begin by indicating the particular clause in the above reproduced text of the Treaty that specifically deals with the disposition of the various categories of islands that include the PNL group, —namely the second (*i.e.* last) sentence of Article III (the "Islands clause"), beginning with the words "As for the islands" ("En cuanto a las islas"). It attributes certain categories of islands to Argentina, and others to Chile. In the latter attribution there figure "all the islands to the south of the Beagle Channel up to Cape Horn" ("y pertenecerán a Chile todas las islas al Sur del canal 'Beagle' hasta el Cabo de Hornos"). It is this attribution that raises the issues involved by the division of the Channel into its two eastern arms, passing respectively north of Picton Island and south-west of it, the geography of which has been described in paragraphs 3 and 4 above. With this preliminary mention of the Islands clause, it will now be convenient to take the provisions of the Treaty in the order in which they occur.

(2) *The title of the Treaty*

18. "*Tratado de Límites*" of limits—Boundary Treaty. This title suggests the spirit and intention of the Treaty as a whole, —for a limit, a boundary, across which the jurisdiction of the respective bordering

States may not pass, implies definitiveness and permanence. As the International Court of Justice said in the *Temple of Préah Vihéar* case (1962 Reports, at p. 34), "when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality". It is true that, in the present case, the only one amongst the provisions of the 1881 Treaty having effect as allocations of territory, or as recognitions of existing title, that fails to draw or define a specific boundary, is the one just mentioned in paragraph 17 above, in which the Fuegian Islands are dealt with. A boundary nonetheless resulted from the attributions made, as will become clear in due course.

(3) *The Preamble*

19. Although Preambles to treaties do not usually—nor are they intended to—contain provisions or dispositions of substance—(in short they are not operative clauses)—it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to "situate" it in respect of its object and purpose. As the Vienna Convention says (Article 31, paragraph 2),

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to its text, *including its* preamble and annexes . . . [stress added].

The Preamble to the Treaty of 1881 cannot be any exception in this respect. *First*, it evidences the intention of the Parties of "resolving" (Spanish "resolver"[6]) their previous or existing boundary controversies, —from which it is legitimate to deduce the consequences stated in paragraph 7 (*d*) (i) and (ii) above, namely that the regime set up by the Treaty, and no other, was meant thenceforth to govern the question of boundaries and title to territory, and that it was meant to be definitive, final and complete, leaving no boundary undefined, or territory then in dispute unallocated or, it might be added, left over for some future allocation. This view is confirmed by the terms of the final phrase of the second paragraph of Article VI of the Treaty which, after specifying that any differences that might "unhappily arise" on account of the Treaty, or "from any other cause whatsoever", were to be "submitted to the decision of a friendly Power", then proceeded to add:

> the boundary specified in the present settlement ["arreglo"] remaining in any case ["quedando en todo caso"] as the immovable limit ["límite inconmovible"] between the two countries.[7]

This provision, already mentioned in paragraph 12 above, is discussed again in a later context—see paragraphs 173 and 174 below.

20. *Secondly*, the Preamble of the 1881 Treaty also emphasizes the Treaty's terminal and final character by, in effect, contrasting it with the provisional character of "Article 39 of the Treaty of April 1856" —(signed in 1855 but ratified the following year) by which—see para-

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[6] The English "terminating", in the text in paragraph 15 above, does not, in the context, give quite the right effect.

[7] The translation given here is closer to the Spanish original than that of the English text of Article VI in paragraph 15 above.

graph 12 *supra*—the Parties deferred the settlement of boundary questions for further discussions and agreement or, failing the latter, for reference to arbitration, and for the time being recognized as the boundaries of their respective territories those existing in 1810—(the *uti possidetis juris*). This was clearly intended as a temporary régime only, to last until the future settlement by agreement or arbitration that was evidently contemplated, —and it seems to the Court that the object, or one of the objects, of the Preamble to the 1881 Treaty was to make it clear that the Treaty constituted precisely the contemplated settlement, duly reached by agreement, since it stated that the Parties were desirous of "giving effect" to Article 39 of the 1855-6 Treaty (Spanish "dando cumplimiento", —literally "giving completion" or "fulfilment" to.[8]

21. Up to this point there would not be much difference of view between the Parties, so that the deduction figuring as subparagraph (iii) of paragraph 7 (*d*) above would, subject to the reservation there specified, be legitimate, as well as those indicated in subparagraphs (i) and (ii) already mentioned in connexion with this Preamble. But beyond this, the Parties' views diverge in one important respect. The Chilean view appears to be that for all practical purposes the 1881 Treaty erases or eliminates all applicability or relevance of the former *uti possidetis juris*, which was thenceforth replaced entirely by the Treaty. The contrary, Argentinean, view does not go so far as to maintain that *uti possidetis* overrides the Treaty settlement whenever the latter conflicts with it, —for that would be to transform the settlement into a work of supererogation. What Argentina does maintain is that *uti possidetis* survives as a traditional and respected principle, in the light of which the whole Treaty must be read, and which must prevail in the event of any irresolvable conflict or doubt as to its meaning or intention. Without pronouncing on this contention, considered as a general proposition that might be applicable in the case of other Latin-American treaties, the Court must point out that, in the particular case of the 1881 Treaty, no useful purpose would be served by attempting to resolve doubts or conflicts regarding the Treaty, merely by referring to the very same principle or doctrine, the uncertain effect of which in the territorial relations between the Parties, had itself caused the Treaty to be entered into, as constituting the only (and intendedly final) means of resolving this uncertainty. To proceed in such a manner would merely be to enter a *circulus inextricabilis*.

22. There is, however, one aspect of the matter that requires further consideration. It is evident that the main reason why Argentina seeks to maintain *uti possidetis* as being at least a latent element of the 1881 settlement, is that this would, or might, lend assistance to her views about what has been called in the course of the case (*supra*, paragraph 11), the "Oceanic", or sometimes the "Atlantic-Pacific" principle or doctrine, according to which each Party had a sort of primordial or *a priori* right to the whole of—and to anything situated on—in the case of

[8] This is another instance of a not quite adequate English rendering—see previous two footnotes.

Argentina, the Atlantic coasts and seaboard of the continent, and in the case of Chile the Pacific, —the counterpart of this naturally being the renunciation of all rights in respect of the opposite coasts or seaboard. It seems however that the Parties, while willing to profit by the positive aspects of this doctrine, were less willing to abide by its concomitant negatives. There is evidence that both sides sought, or were prepared, when they could, to establish themselves at available points on the reverse shores of the continent.[9] Be that as it may, the "Oceanic" doctrine was itself based on, or a resultant of, what the Parties claimed to be the position under *uti possidetis*, and no more than the latter can it be regarded as governing *a priori* the intepretation of the 1881 Treaty. In this connexion the remarks made in paragraph 21 above are equally applicable.

23. Nevertheless, the Court realizes that this does not entirely dispose of the matter. The doctrine, even though it has to be rejected as a principle having binding or interpretative force generally, may yet be relevant and have a part to play in particular contexts; —but it will be convenient to postpone discussion of that aspect of the matter until those contexts come to be considered. All that the Court is saying here is that the doctrine does not have the status of a sort of *jus cogens* of the whole Treaty.

B. The territorial provisions (Articles I-III)

(1) *General structure of the territorial settlement*

24. It is evident that if the Treaty was to accomplish its purpose, it had to deal with, or cover, each of the four main regions or categories described in paragraph 14 above. This it did, as regards region (1)—Patagonia ("north of the line"),[10] —by defining a north-south boundary

[9] Chile's claim to the whole of Patagonia, south of the Río Negro was itself an example of this, as was also her claim to the Atlantic end of the Straits of Magellan. As regards Argentina, although it is difficult to be sure of what was being referred to, Pacific aspirations certainly seem to be reflected in the following passage from the speech of Señor Irigoyen, the Argentine Foreign Minister (at p. 137), mentioned in n. 4 to paragraph 13 above, in which he said—quoting Dr. Moreno with approval (see paragraphs 135 and 158 below)—that "since we are talking of ports, I would say that, while I am certain that by the July settlement, we did not give away any ports on the Atlantic, I believe it probable that the Republic [*i.e.* Argentina] does acquire them in waters which flow into the Pacific . . ."

[10] For present purposes Patagonia is most easily thought of as the region east of the Andes and south of the Río Negro as far as the Dungeness-Andes line described in the text above. It can conveniently be called "Patagonia proper". Together with the region south of that line down to the Straits of Magellan (also geographically included in the notion of Patagonia), it was sometimes called "continental" Patagonia. But this latter region, *i.e.* west and north of the Straits up to the Dungeness-Andes line, is perhaps best thought of as "Magellanic" Patagonia. Other candidates for the appellation—as depicted in older writings and maps—would be the Isla Grande of Tierra del Fuego ("Fuegian" Patagonia) and the islands ("archipelagonian Patagonia"—which could however also include the Isla Grande, just as could "Magellanic" Patagonia. The relevance of these complexities will appear later.

down the Andes as far as the 52nd parallel (Article I), and a west-east one following that parallel to the 70th meridian, and thence by an *ad hoc* line to Cape Dungeness on the Atlantic (the "Dungeness-Andes" line of Article II). The area east and north of these two lines was to be Argentinean, —west and south, Chilean. As regards region (2)—the Straits of Magellan and the Magellanic area—this went to Chile (Articles II and half of III). In region (3), namely the Isla Grande of Tierra del Fuego, the eastern part went to Argentina and the western to Chile—(this was by virtue of Article III, first half, the "Isla Grande clause"). Finally, in region (4)—the islands—some of these went to Argentina and some to Chile (under the second half of Article III, the "Islands clause").

25. A few years previous to the conclusion of the 1881 Treaty when, as mentioned in paragraph 13 above, negotiations for a definitive boundary treaty were seriously embarked upon after some preliminary interchanges in the period 1872-5, there emerged in July 1876 what became known as the "Bases of Negotiations" of that year, or the "Bases of 1876". These, which encompassed the territorial provisions of the proposed settlement, emanated from the Argentine Government, being put forward by Señor Bernardo de Irigoyen, the then Foreign Minister of Argentina. They were not at the time accepted by Chile, and the negotiations for a treaty were temporarily set aside in favour of renewed attempts to agree upon terms for settling the boundary question by arbitration, which occupied the years 1877-9. These, too, came to nothing, and new Argentine proposals made in 1879 were rejected as being much less favourable to Chile than Señor Irigoyen's "Bases of 1876". There matters rested until, late in 1880, a fresh initiative led to the good offices of the United States Ministers in Buenos Aires and Santiago being invoked. Both these happened to be named Thomas Osborn, being distinguished only by their middle initials. Thenceforward exchanges were carried on through them, and led to the conclusion of the Treaty in July 1881. The Court does not, however, think it necessary to describe these negotiations, except as regards one or two particular matters that will be considered in due course later. What did recover all its importance at this point and largely upon Señor Irigoyen's insistence were his own proposals of 1876, *viz.* the "Bases" of that year, on the foundation of which the concluding negotiations (of 1881) were carried on, and which, as will be seen, entered with very little change into the eventual Treaty. The first of these Bases (*Base Primera*) was reflected generally in Article II of the Treaty; the second (*Base Segunda*) in the first half of Article III; and the third (*Base Tercera*) in the second half of that Article—the Islands clause. There were two structural differences, however. The Treaty supplemented the 1876 *Base Primera* by an Article I dealing with the boundary down the Andes; and it combined the two remaining Bases (*Segunda and Tercera*) into a single provision, as Article III. Because of their importance, and because it will be necessary to refer to them again, the Spanish and English texts of these Bases, as made available by Argentina, are set out below:

BASE PRIMERA

PUNTO DE DIVISIÓN SOBRE EL ESTRECHO: "MONTE DINERO" A 52°19′

"La línea partiría de este punto, siguiendo las mayores elevaciones de la cadena de colinas que se extiende hacia el Oeste, hasta la altura denominada 'Monte Aymond' a 52°10′.

De este punto se trazará una línea que, coincidiendo con el círculo 52°10′, llegue hasta la Cordillera de los Andes. Esta línea será la división entre la República Argentina que quedará al Norte y la República Chilena al Sur.

BASE SEGUNDA

DIVISIÓN DE LA TIERRA DEL FUEGO

"Del punto denominado 'Cabo del Espíritu Santo' y en la latitud 52°40′ se trazará una línea hacia el Sur que coincida con el meridiano (de Greenwich) 68°34′ cuya línea se prolongará hasta el 'Canal Beagle'. La Tierra del Fuego dividida de esta manera será argentina en su parte Oriental —chilena en la parte Occidental.

BASE TERCERA

ISLAS

"Pertenecerán a la República Argentina la Isla de los Estados, los islotes próximamente inmediatos a ésta y las demás islas que haya sobre el Atlántico al Oriente de la Tierra del Fuego y costas Orientales de la Patagonia y pertenecerán a Chile todas las otras islas al Sur del Canal de Beagle hasta el Cabo de Hornos y las que se hallan al Occidente de la Tierra del Fuego."

BASIS ONE

PLACE OF DIVISION ON THE STRAIT: MONTE DINERO AT 52°19′

The line would start from that point following the highest peaks in the range of hills which extends towards the west as far as the peak named "Monte Aymond" at 52°10′.

From this point a line shall be traced which, coinciding with latitude 52°10′, reaches as far as the Cordillera of the Andes. This line shall be the division between the Argentine Republic which will lie to the north and the Chilean Republic to the south.

BASIS TWO

DIVISION OF TIERRA DEL FUEGO

From the point named "Cabo del Espíritu Santo" and in latitude 52°40′ a line shall be traced towards the south which follows the meridian (of Greenwich) 68°34′ which line will extend as far as the "Canal Beagle". Tierra del Fuego thus divided shall be Argentine in its eastern part—Chilean in the western part.

BASIS THREE

ISLANDS

There shall belong to the Argentine Republic Isla de los Estados, the islets in close proximity to it and such remaining islands as are on the Atlantic to the east of Tierra del Fuego and eastern coasts of Patagonia and there shall belong to Chile all the other islands to the south of the Beagle Channel as far as Cape Horn and those which are to the west of Tierra del Fuego.

(2) *Patagonia and the nature of the "Compromise" (Articles I and II)*

26. While both the Parties subscribed to the view (*supra*, paragraph 16) that the Treaty represented a compromise between their rival claims to the same territories, they differed as to the character of this compromise; as to what territorial claims were covered by it; and as to the effect of it on the interpretation of the whole territorial settlement brought about by the Treaty. Consequently, although it is the Islands clause of Article III with which the Court will in due course be particularly concerned, it is necessary first to review the other territorial provisions that preceded it. At the outset the Court observes that the Parties do not agree on the way the three territorial articles are related *inter-se*. According to Argentina there is no link between them except that they follow in sequence. Each article is intended to apply to a predetermined sector to the exclusion of any other, and each sector is to be determined by one article and one only. Each article is, so to speak, autonomous. Thus Argentina claims that the geographic scope of Article II in the north must necessarily stop at the latitude to which the effects of Article I extend southwards; and to the south, the scope of the same Article II must stop where the effects of Article III begin. In contrast, Chile claims that the Treaty must be viewed as an integrated or organic whole, and that the geographic scope of the three articles cannot be fully understood without reference to the compromise which conditioned their field of application. Thus Article II cannot be understood without reference to the provisions of Article I, nor can it be understood without reference to Article III. This view appears to the Court to be the correct one.

27. With regard to the character of the "compromise"; —to put the matter in its simplest terms, Chile contends that the essential aspect of it was a renunciation by her of her claim to "Patagonia proper" (see footnote 10 above), and a recognition on her part of Argentina's title to that considerable area, —in return for an Argentinean renunciation of all Magellanic claims, and a corresponding recognition of Chile's right of exclusive control over the Straits of Magellan and all the bordering territory and islands south of the Dungeness-Andes line, as far, in principle, as Cape Horn, excepting only such territory or islands as other provisions of the Treaty might specifically attribute to Argentina or deny to Chile.

28. On the Argentine side, this view of the compromise was totally rejected. It was contended that Chile never had any valid claim to Patagonia proper, and that the definitions—(contained in Article I and II)—of the Patagonian boundary lines—(north-south along the Andes down to the meeting with the Andes-Dungeness line, and then west-east along that line to the Atlantic)—operated merely as recognitions of the validity of Argentina's already acquired title, not as new

attributions of territory to her.[11] Patagonia proper consequently never entered into the compromise, which only started with the attribution to Chile of the Magellanic area. The true basis of the compromise or bargain was not therefore Patagonia *versus* the Straits and bordering areas, but the latter *versus* a recognition in Argentina's favour of the "Atlantic" principle. It was because of this latter recognition that Argentina was, under Article III of the Treaty, allocated the eastern (Atlantic) half of the Isla Grande of Tierra del Fuego, Staten Island off the south-eastern toe of the continent and, as Argentina contends, all those Atlantic islands that fringe the Fuegian archipelago on its eastern side, down to Cape Horn, including the PNL group.

29. Without pronouncing as yet on the "Atlantic" aspect of the matter, the Court is unable to accept the view that Patagonia proper (by a very great deal the largest area involved in the Treaty settlement) has to be regarded as excluded from the reciprocal concessions underlying that settlement. This could only be so if the claim of one or other Party to the Patagonian interior was so manifestly valid as to admit of no serious question. No doubt, as Argentina herself stresses, Article I of the Treaty was, in form, a boundary-defining, rather than a territory-attributing provision. But to assume that this was so because the issue of title was no longer in dispute would be unrealistic, —and if Article I did not in terms attribute territory, Article II clearly did so. This was the Article under which the status of Patagonia as Argentinean was really determined, —for having first defined its southern, cross-continent, boundary by means of the Dungeness-Andes line, it then went on to provide in terms that "the territories to the north of the said line shall belong to the Argentine Republic"—"Los territorios que quedan al Norte de dicha línea pertenecerán a la República Argentina". This was a definite attribution of territory.

30. In connexion with this attribution the Court is unable to accept the contention—(predicated presumably on the view that Patagonia proper was always, and already, Argentine)—according to which the attribution to Argentina effected by Article II must be regarded as relating only to the triangle of territory (shown in red on Map B) created by the prolongation eastwards of the line of that parallel from its intersection with the 70th meridian at the Cono Grande, until it reaches the Atlantic coast; and consisting of the area south of that prolongation and lying between it and the eastern (*i.e.* Cono Grande-Cape Dungeness) portion of the Dungeness-Andes line. The attribution made by Article II cannot be thus confined, because it is quite explicit and unqualified; —the territories "north of the said line" ("de dicha línea")—*i.e.* of the whole Dungeness-Andes line—"shall belong" ("pertenecerán")—not "do belong" ("pertenecen") "to the Argentine Republic"; —and "the said

[11] Argentina did seem to concede that it was by *attribution* that she obtained the small triangle of territory bounded by the eastern end of the 52nd parallel, the Atlantic, and that part of the Dungeness-Andes line that meets the 52nd parallel at meridian 70°. This triangle is coloured red on Map B, —and see paragraph 30 below.

line" is carefully defined east-west from its starting-point at Cape Dungeness to where it meets the 52nd parallel at the 70th meridian and, continuing thence, runs "to the west, coinciding with this latter parallel as far as the *divortia aquarum* [watershed] of the Andes".[12] This was an attribution of the whole of Patagonia north of the Dungeness-Andes line up to its generally recognized northern boundary, say at the Río Negro.

31. In these circumstances the Court finds it unnecessary to consider whether Chile's claim to Patagonia proper, previous to the conclusion of the Treaty, was good or bad, or strong or weak. It was certainly sustainable, even if only as a bargaining or negotiating counter, and had been strenuously maintained for many years in earlier discussions, and in those that led up to the Treaty. Indeed, so far was the principle of a division of some kind from being in issue, that these discussions seem to have been centred almost exclusively on the question of how far down the continent from the Río Negro the southern boundary should be drawn. Chile at different times claimed various boundaries considerably to the north of the Dungeness-Andes line, Argentina declining successively to accept them, —and the agreement eventually arrived at, which gave Chile nothing north of this line[13], was the price she had to pay for obtaining in return the exclusive control of the Straits and of the whole Magellanic region, which was her chief desideratum throughout, —just as Argentina's was the definitive recognition of her exclusive title to all of Patagonia except that small part of it that lay south of the Dungeness-Andes line as far as the Straits. This was what Chile conceded by giving up a claim that still had enough vitality and content, at least politically, to make its final abandonment of primary importance to Argentina. It is on this basis, as well as on the actual attribution of Patagonian territory to Argentina effected by Article II of the Treaty, that the Court reaches the conclusion that it was the antithesis Patagonia/Magellan, rather than Magellan/Atlantic, which constituted the fundamental element of the Treaty settlement. The rest, notwithstanding its importance, was secondary to that. It does not however follow from this conclusion that no "Atlantic" element at all entered into the framework of the Treaty; —the real question is to determine what precise scope it had in that respect, and this will more conveniently be considered at a later stage.

(3) *The Magellanic area and Chile's attribution under Article II*

32. Chile's attribution under Article II of the Treaty appears at first sight to be perfectly straightforward; but in fact involves a point of considerable difficulty, having, possibly, a direct bearing on the question of the title to the PNL group. Just as, in accordance with what has been described above, Argentina was, by this Article, attributed the

[12] As a matter of pure wording, the Treaty text of Article I differed in certain respects from the *Base Primera* of 1876 (*supra*, paragraph 25), but the effect is substantially the same, —and the proposal was fundamentally that of the Argentine Government.

[13] But south of it she obtained much of what, according to other concepts of it, could be called "Magellanic" or other forms of Patagonia—see n. 10 above.

territories north of the Dungeness-Andes line, so also was it provided that "to Chile [shall] belong those [territories] extending to the south of it", —"y a Chile los que se extiendan al Sur [de dicha línea]". This attribution was, by definition, limited in the north by the Dungeness-Andes line itself, but was not assigned any specific southern limit. It was qualified only by the clause figuring at the end of Article II, which stipulates that Chile's allocation of the territories south of the Dungeness-Andes line would be "without prejudice to what is provided in Article III respecting Tierra del Fuego and adjacent islands"—("sin perjuicio de lo que dispone respecto de la Tierra del Fuego e islas adyacentes el artículo tercero"). The exact significance of this clause will be considered in a moment, —but the ensuing situation is claimed by Chile to be that, *in principle*, and subject only to the effects of this one qualifying clause, the result of Article II was to attribute to her all the territory and islands to the south of the Dungeness-Andes line as far as Cape Horn.

33. Argentina rejects this view, and contends, in the first place, that a further qualification, additional to that involved by the "without prejudice" clause at the end of Article II, results from the expression that occurs right at the start of the Article, *viz.* "In the southern part of the Continent,[14] and to the north of the Straits of Magellan, the boundary between the two countries shall be a line which, . . .", etc. —("En la parte Austral del Continente y al Norte del Estrecho de Magallanes, el límite entre los dos países será una línea que . . ."). According to Argentina the effect of this, and particularly of the words "and to the north of the Straits of Magellan" was to confine the application of the whole Article, so far as Chile's allocation under it was concerned, to the area north of the Straits and between these and the Dungeness-Andes line. Chile, however, contends that the phrase in question was designed only to indicate the particular region in which the *dividing line* between the blocs of territory respectively allocated to each country was to be drawn, and did not in itself have the result of limiting the ultimate extent (north and south of that line) of those allocations, or of excluding *a priori* from Chile's allocation all territory south of the Straits. In other words, Chile contends that the legal effect of the specified line is governed by the division indicated in the first half of the last sentence of Article II (immediately before the "without prejudice" clause), —whereas the opening sentence of the Article is merely intended to locate the actual area through which the boundary would run and bring about the division. The Court considers this view to the broadly correct as a matter of textual interpretation. The Argentine allocation, though north of the Straits, was also north of the Dungeness-Andes line and therefore had nothing to do with the area between that line and the Straits, —while in respect of Chile's allocation, no southern terminal was specified, and the mention of "Tierra del Fuego and adjacent

[14] The comma here does not figure in the Spanish text, but this does not seem to affect the sense.

islands" in the "without prejudice" clause[15] must tend to indicate or imply a potential extension to, and inclusion of those regions in her allocation, —subject of course to what might be attributed to Argentina or denied to Chile by Article III, —thus negativing any limitation of the Article to exclusively "continental" territory in the manner Argentina has contended for— (vide *supra*).

34. This conclusion is borne out by the relevant part of the Treaty terms, as proposed by Argentina herself in 1876 through Señor Irigoyen, the Argentine Foreign Minister, and chief negotiator for his country. These terms, or "Bases", of 1876 (*supra*, paragraph 25) were reported to the Government of Chile by the chief Chilean negotiator at the time, Señor Diego Barros Arana, Chilean Minister in Buenos Aires. Having, in a telegram of 5 July 1876[16], informed his Government that, following "four long conferences and many discussions, Señor Irigoyen . . . *has presented me* [stress added] with the following terms for a friendly settlement . . .", Señor Barros Arana then confirmed and elaborated these in a despatch dated a few days later (10 July)[17], the accuracy of which the Court sees no reason to doubt. After giving an account of his conferences and discussions with Señor Irigoyen, Señor Barros Arana went on: "I must inform you that *I am copying the text* [stress added] of the conditions drawn up during our conference and that these are, with minor differences in words, what I informed you of in my cable dated 5 instant." He then continued as in the *Base Primera* set out at the end of paragraph 25 above:[18]

> "Point of division on the Strait", Monte Dinero, latitude 52°19′. The line would start from that point [and] . . . [here came a description of the line] . . . would be the dividing line *between the Republic of Argentina which would lie to the north and the Republic of Chile to the south* [stress added].

35. The objection that can be made to the conclusion stated at the end of paragraph 33 above, and fortified in paragraph 34—a conclusion which would otherwise seem to be incontrovertibly correct—is that Article III proceeds to make allocations of territories and islands south of the Straits of Magellan, not only to Argentina, but also to Chile. If it confined itself to doing the former alone—allocating territories and islands to Argentina—there would be no difficulty. Such allocations would thereby be taken out of Chile's global allocation under Article II and would go to Argentina, while all areas not specifically so allocated would automatically remain Chilean by virtue of Article II. The moment, however, that Article III proceeds (as is the fact) to make allocations to Chile, as well as to Argentina, of localities south of the Straits, it merely does all over again what (according to the Chilean contention) is supposed already to have been done globally under Article II. In other

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[15] This clause, which constitutes one of the very few differences—of substance at least—between the Treaty Article II and the *Base Primera* of 1886, was incorporated at a late stage, on the proposal of Señor Melquiades Valderrama, the then Chilean Foreign Minister.

[16] Chilean Annex No. 21, p. 42 of the volume.

[17] *Ibid.*, No. 22.

[18] At the end of p. 43.

words, if Chile's view of Article II is correct, the attributions made to her under Article III would appear to be redundant and unnecessary.

36. Chile invokes the integrative approach (*supra*, paragraph 26) to counter the above interpretation that seems to lead to a double attribution to her of the western part of Tierra del Fuego and the islands south of the Beagle Channel as a result of Articles II and III. Thus she correctly asserts that Article II does not specify what part of Tierra del Fuego and what islands fall respectively to Argentina and Chile. This is left for Article III. It follows that while the two articles deal with the same territories, they do not duplicate each other, and thus the alleged redundancy is, at best, only a partial or seeming one. Chile denies that Article III is merely a subtraction from or exception to Article II. The two are linked through the "without prejudice" clause so that, while Article II sets out in principle a general allocation, Article III fulfils or implements it in detail. Argentina could reply to this that if the Chilean view were correct, it would only have been the details of *Argentina's* attributions that needed spelling out. Once these were known, those of Chile would result automatically from Article II, and would not need any spelling out. But this is not necessarily conclusive—see paragraph 38 below.

37. It might be argued that, so far, the objection stated above, in paragraph 36, is one of form rather the substance, —that the redundancy (whatever the reason for the method of drafting which caused it) does not matter so long as, whether on the one basis or the other, the Parties obtain what they were respectively intended to obtain and no more, —that provided Argentina obtains what is attributed to her under Article III, it makes no difference whether Chile, with respect to what is *not* attributed to Argentina, obtains is a result of the global effect of Article II, subject to the "without prejudice" clause, or does not obtain anything more under Article II than the region between the Dungeness-Andes line and the Straits of Magellan, and has to look to Article III for her attributions south of the Straits. As regards the *waters* of the Straits, since an attribution to Chile of both shores would give her these waters, it makes no difference, except as a matter of presentation, whether she receives the two shores at once under Article II, or receives one under that Article, and the other under Article III.

38. But in fact, the redundancy involved may perhaps be not merely formal in kind, devoid of material content: it may lead to definite anomalies and even to possible contradictions. This can be seen in the context of the very question the Court has principally to decide in the present case, —the title to the PNL group. Under Article III this group goes to Chile if it lies "to the south of the Beagle Channel", as that designation is to be interpreted for the purposes of the Treaty, —but *only* if it does so—(since it clearly does not come under the one other head of Chile's Article III attribution, *viz.* of being "to the west of Tierra del Fuego"). However, according to the Chilean global view of Article II, Chile obtains the group simply by reason of its being south of the Dungeness-Andes line, and but for the "without prejudice" clause, would do so irrespective of its situation in relation to the Beagle Channel.

Moreover, if it appeared that the group was *not* south of the Channel, it would not go to Chile under Article III, but might still (arguably at least, despite the "without prejudice" clause) do so under Article II, unless the mere fact of it not being Chilean under Article III made it Argentinean under that Article—which does not necessarily follow.

39. To this it can be replied that even ignoring the "without prejudice" clause, all conflicts or anomalies can be disposed of by applying the rule *generalia specialibus non derogant*, on which basis Article II (*generalia*) would give way to Article III (*specialia*), the latter prevailing; and hence that no logical objection can be made to an Article II allocation to Chile of, *in principle*, everything south of the Dungeness-Andes line.

40. Argentina, for her part, contends that even if these difficulties can be thus resolved, it should not be necessary to do so, since Article II can be interpreted in such a way as to avoid all redundancies, duplications and possible conflicts (which it cannot have been the intention of the negotiators of the Treaty deliberately to create) simply by deeming Chile's allocation under it to be confined to what lies between the Dungeness-Andes line and the Straits of Magellan; any attributions south of the Straits depending exclusively on the effect of Article III: only in this way could it be made certain that the clear intention of Article III to limit Chile's allocations in respect of Tierra del Fuego and the islands to those specifically provided for by it would be carried out and not nullified through the operation of the otherwise engulfing and "catch-all" effects of Article II.

41. To the Argentine contentions and other objections mentioned above, Chile opposes two further main considerations. *The first* of these is that to deny the global effect, *in principle*, of Article II would be to render pointless the important "without prejudice" clause figuring at the end of it, and to deprive that clause of all meaning and object although, at a certain stage of the negotiations for the 1881 Treaty, it was specifically proposed from the Chilean side and accepted without demur on the Argentine—(see footnote 15 above). If, however, the Argentine view of the effect of Article II is correct, and Chile received nothing south of the Straits of Magellan under this Article, her allocations in that area depending entirely on Article III, then a "without prejudice" clause potentially qualifying Chile's Article II allocation in respect of that area would not in any case have given Chile anything south of the Straits. Furthermore, as has already been mentioned (*supra*, end of paragraph 33), the specific indication of "Tierra del Fuego and adjacent islands" in the "without prejudice" clause shows that the allocation which this clause was directed to qualifying, and which otherwise would have been without limit south of the Dungeness-Andes line, was one that did in principle extend to and comprise all of Tierra del Fuego and the islands, except of course in so far as Article III might make specific allocations in those regions to Argentina, or limit those of Chile.

42. In this last connexion, the Court is unable to follow the Argentine contention whereby the "without prejudice" clause, by pointing

ahead to Article III, implies that the Chilean allocation under Article II does not trespass on the sphere of Article III, —and therefore that the reach of Article II does not extend beyond the Straits of Magellan. Rather does it seem to the Court that it was because of the danger, arising precisely from its generality, that Article II might conflict with Article III, that the addition of the "without prejudice" clause was required.

43. The Chilean argument stated in paragraph 41 above is, it will be observed, balanced by the Argentine contention that, if the Chilean view is the right one, all those parts of Article III that make attributions to Chile are rendered pointless and redundant because they already result from Article II. Chile however advances, as *a second* main consideration, certain further elements of a different order: namely that, historically (see paragraph 31 above), the question that really divided the two countries during the years of long and arduous discussion preceding agreement on Article II of the 1881 Treaty was essentially the *situs* of the east-west line that would separate their main spheres of influence south of the Río Negro, and not the *principle* that this line, once drawn, and whatever its basic latitude might be, would thenceforth have an ordinating or regulative, and not merely a boundary-fixing effect, —that is to say that subject to the frontier along the Andes, and to any special attributions of particular pieces of territory, Argentina would be installed north of this line, without northward limit, and Chile south of it, without southward limit other than the sea. It was contended that the general attitude of the Parties showed the existence of a tacit understanding that somewhere north of the Straits of Magellan a horizontal line would be drawn that would distinguish their respective areas of control and sovereignty. The difficulties that arose were over the fixing of this line, not the determination of its legal consequences. Hence, when the Dungeness-Andes line was finally agreed upon, this understanding took effect and received formal expression in Article II of the Treaty, —the territories north of the line to Argentina, and those south of it to Chile, subject only to the "without prejudice" clause. This view is strongly supported by the account of the 1876 Irigoyen-Barros Arana negotiations given in paragraph 34 above.

44. The point discussed in the preceding paragraph is of course a completely different one from that involved by the fact that the difficulty in fixing the horizontal boundary-line north of the Straits of Magellan arose from the Argentine insistence on this being done in such a way that Chile would obtain no port or piece of coast on the Atlantic. Here the Court recalls what it said in paragraphs 23 and end of 31 above, and will revert to the matter later.

45. Chile also supports her contention described above in paragraph 43 by historical material which was conveniently summarized in the course of the oral hearings before the Court.[19] But even if this

[19] Oral Proceedings, VR/2, pp. numbered "141-151".

material could be matched by counter-material from the other side, which might cancel it out (as to which see paragraphs 47 and 48 below), the Argentine counter-argument has really functioned on an essentially different plane, namely that of the part played by the Patagonian question in the "transacción"—("accommodation")—involved by the Treaty settlement. On the assumption that Patagonia was excluded from this as being already Argentinean, it would not be an unreasonable hypothesis that, under Article II, all that Argentina really received *de novo* was the small triangle of Patagonian territory north of the Dungeness-Andes line at its eastern end, described in footnote 11 and paragraph 30 above (the rest of Patagonia being hers already)—and that to balance this, Chile received no more under Article II than the region between that line and the Straits of Magellan. But, as has already been seen (paragraphs 29 and 30), the Court feels unable to accept the Argentine view of the Patagonian question. At the risk of repetition, this view was to the effect that Article I, by defining a north-south boundary down the Andes, simply *recognized* Patagonia north of the 52nd parallel as being (already) Argentinean, so that it was inadmissible to suppose that this whole territory would have been attributed to her, as if *de novo*, by Article II. Thus Article I merely defined a boundary but made no actual attribution. This was true, so far as concerned Article I, but ignored the attribution unqualifiedly made by Article II, —*supra*, paragraph 29.

46. If therefore, as the Court thinks, Argentina, by the combined effect of Articles I and II, obtained the whole Patagonia north of the Dungeness-Andes line and east of the Cordillera of the Andes, it does not seem unreasonable to regard Chile as receiving *in principle* under Artice II the much smaller area between that line and Cape Horn, subject always to the effect of the "without prejudice" clause and the provisions of Article III. This would also be consistent with the view, stressed by Chile, that, it being a primary object of the Treaty to give her the exclusive *control* of the Straits, it would be natural to do this by means of a single provision (Article II) under which she would simultaneously receive both shores of the Straits, and not merely one.

47. On the Argentine side, some stress was laid on a despatch of October 1876 from the then Chilean Minister for Foreign Affairs, Señor Alfonso, to his representative in Buenos Aires (Señor Barros Arana), where the negotiations for the eventual Treaty of 1881 were taking place. In this despatch[20] reference was made to the 1876 "Bases of negotiation", and it was stated with regard to the Dungeness-Andes line that the "territories to the north of this line would be Argentinean and those to the south, up to the Strait ("hasta el Estrecho"), would be Chilean". Yet this limitation "hasta el Estrecho" did not appear in the corresponding 1876 Bases of negotiation (*supra*, paragraph 25, *Base Primera*) and had not appeared in the reports from the Chilean representative in Buenos Aires dated July of the same year (see *ante*, para-

[20] Chilean Annex No. 24.

graph 34), to which the October despatch of the Chilean Foreign Minister was the reply. The latter moreover, in an earlier despatch of May 1876, again referring to what was to become the Dungeness-Andes line, had said just the opposite, namely that "*All the territories* situated to the south of [the] said line, *including the Straits and the Tierra del Fuego* [stress added] would, therefore, be acknowledged as an integral part of the Chilean territory"[21]. After receipt of the Irigoyen Bases, this was repeated by the same writer in August 1876, when he instructed his representative in Buenos Aires that any settlement would be unacceptable which did not "ensure for Chile the full and complete possession *of all the Strait with the area of territory adjacent*" [*scilicet*, as to both shores] "required to guarantee and make effective such possession . . ." [stress added].[22] On the Argentine side of the negotiation (and it was from this side that the 1876 Bases had been put forward), no limitation "hasta el Estrecho" seems ever to have been proposed, and none figured in the final, 1881, text of Article II which, however, had had added to it precisely the "without prejudice" clause that clearly implied the extension, *in principle*, of Chilean territory south of the Dungeness-Andes line, and south of the Straits, to Tierra del Fuego and the islands.

48. The Court has thought it desirable to go into the details of the interchanges just described, not because the matter is to be regarded as in any way decisive in itself, but because it affords a good illustration of two general features that figure prominently in the present case, —namely how alleged intentions which would have lent themselves to the simplest kind of expression in the text are not reflected there, and sometimes something quite different is, —and secondly, the considerable difficulty that must exist in drawing firm conclusions from statements and declarations the real effect of which (quite understandably, given the circumstances of the time and of the negotiation) may well be uncertain and even contradictory.

49. Normally, the Court would now endeavour to reach a conclusion about the extent of the Chilean allocation effected by Article II, considered in itself. But it has been seen that the rival theses are closely balanced, even if the balance seems to tilt somewhat in favour of the Chilean view, though perhaps not with complete finality. In these circumstances the Court proposes not to reach any definite conclusion on the matter at this stage, but to defer it, and return to it if necessary when other aspects of the case have been examined. In fact, this would be necessary only if it ultimately appeared that there were areas that would not be allocated at all under the Treaty unless they were caught by the residuary effect of Article II.

(4) *The Isla Grande clause of Article III*

50. For convenience of reference the Spanish and English texts of this clause are set out again below:

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[21] *Ibid.*, No. 20 at p. 41.
[22] *Ibid.*, No. 23.

Artículo III

En la Tierra del Fuego se trazará una línea que, partiendo del punto denominado Cabo del Espíritu Santo en la latitud cincuenta y dos grados cuarenta minutos, se prolongará hacia el Sur, coincidiendo con el meridiano occidental de Greenwich, sesenta y ocho grados treinta y cuatro minutos hasta tocar en el canal "Beagle". La Tierra del Fuego, dividida de esta manera, será chilena en la parte occidental y argentina en la parte oriental.

Article III

In Tierra del Fuego a line shall be drawn, which starting from the point called Cape Espíritu Santo, in parallel 52°40′, shall be prolonged to the south along the meridian 68°34′ west of Greenwich until it touches Beagle Channel. Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentine on the eastern.

There is no dispute between the Parties about the meaning and effect of the above-cited text of the first half of Article III of the Treaty, according to which the Isla Grande of Tierra del Fuego was divided between the two countries, —and there is no point on which the Court need pronounce in relation to this provision as such, although the interpretation to be given to some of its phraseology will be considered in connexion with the second half of the Article—the Islands clause. There was, however, one important geographical consequence of the Isla Grande clause that should be mentioned now. In effecting a division of the Isla by means of the perpendicular drawn from Cape Espíritu Santo to Point X near Lapataia on the Beagle Channel (see Map B), the clause created, very roughly, two back-to-back right-angled triangles with one common side (the perpendicular), —the western triangle going to Chile and the eastern to Argentina. Thus, proceeding northwards from the base of the perpendicular at Point X, the western limit of Argentina's allocation was defined by this perpendicular, while the other two sides *needed no defining*, being already self-evident, —on the eastern side, the Atlantic coast from Cape Espíritu Santo to Capes San Diego and Buen Suceso near Staten Island, —and, on the remaining (southern) side, the south shore of the Isla Grande from Cape Buen Suceso westwards to Cape San Pío, about 7 miles (say 11 km.) due north of Nueva Island in the PNL group; and onwards back to the base of the perpendicular at Point X near Lapataia on the Beagle Channel, —thus completing the circuit of the Argentinean triangle. From this it is evident that it was the south shore of the Isla Grande from Cape Buen Suceso to Point X on the Beagle Channel, and its appurtenant waters, *that constituted, in principle the southern limit of Argentina's attributions under the Treaty*, —except of course in so far as particular islands or groups of islands situated beyond that limit might be allocated to her under the second half of Article III (the Islands clause).

51. In the case of Chile, her Isla Grande "triangle" consisted automatically of the southern and eastern shores and hinterland of the Straits of Magellan, —already, accordingly to the Chilean contention, hers by virtue of Article II (*vide supra*, paragraphs 32 *et seq.*), but in any

case becoming so under the first half of Article III, —while (again in so far as not already attributed by virtue of Article II) the whole south shore of the Beagle Channel, from west of Isla Gordon to the north-eastern end of Navarino Island, was to become allocated to her under the second half of Article III—the Islands clause—("all the islands to the south of the Beagle Channel")[23]. This left the PNL islands situated roughly mid-way between the south shore of the Isla Grande (Argentinean) and the north-eastern and eastern coast of Navarino (Chilean). Chile contends that they are hers because they too are "south of the Beagle Channel". Argentina claims them equally, on the ground (*inter alia*) that they are not "south" of the Channel which, in her view, flows in this locality between Navarino Island on the west, and Picton and Lennox Islands on the north-east and east. This brings the Court to the next stage of the case; but before passing on from this (the Isla Grande) clause of Article III to the "Islands clause" of the same Article, it should be mentioned that the implications for the "Atlantic" question of the way the Cape Espíritu Santo–Beagle Channel line was drawn will be considered in connexion with this latter (Islands) clause—see paragraph 76.

(5) *The "Islands clause" of Article III*

(i) *Preliminary questions*

52. *The first* preliminary question that arises is whether the Court must necessarily go into both the sets of attributions effected by the Islands clause—the Argentine and the Chilean, —that is to say whether, if it should be found that the PNL group falls within one (*i.e.* either) of these attributions, it would be necessary also to establish that it does *not* fall within the other. Such a process, which must of course imply that the group could fall under both attributions, ought, in principle, to be excluded *a priori*: for if the group falls within the one attribution, this should automatically eliminate the possibility that it falls within the other, since it must be axiomatic that the negotiators cannot have intended a double attribution of the same islands to both Parties. Thus a definite finding in the one sense not only ought to preclude a finding in the other, but also to act as a bar, *in limine*, even to the examination of it. However, the Court does not propose to proceed in that way, if only because it may not be possible to reach a sufficiently definite conclusion in favour of the one attribution without also considering the other. The difficulties mentioned in paragraph 38 above may equally be relevant here. The Court must therefore investigate both sets of attributions in some detail.

53. *The second* preliminary question that arises is whether, having regard to the different ways in which the Parties have framed their respective requests (see *supra*, paragraph 2), the Court, in resolving the

[23] An Argentine contention that certain *western* islands failed to get allocated to Chile, if Chile's interpretation of the "Islands clause" of the Treaty is correct, is considered hereafter in paragraphs 63, and 100-102.

question of the PNL group, should proceed by the method of drawing a line in the Beagle Channel which would place the group either north or south of it—or place part of it north and part south—or should adopt an attributive method, from which a line would result. The Court has in any case to draw a line on a chart (Article XII (1) of the *Compromiso—supra*, end of paragraph 6); but such a line could either give rise to attributions or be a resultant of these. Thus an enquiry conducted from both points of view seems called for. On the other hand the Court does not consider it to be any part of its task (for which it would also not be qualified) to determine what, as a matter of physical topography, is the "true" course of the "authentic" Beagle Channel at its eastern extremity. What the Court has to decide, whether directly or as a matter of necessary inference, is what that course is, *or must be deemed to be, for the purposes of the Treaty of 1881*.

54. There are also a number of questions, in a sense preliminary, but difficult to deal with as such, —for instance whether the PNL group must be allocated as a whole or could and should be divided, —whether the Beagle Channel should be viewed as running neither north nor south of the islands of the group, but as stopping short of them—and with what effect. These are all matters best left for later consideration.

(ii) *Analysis of the Argentine attribution under the "Islands clause" of Article III—Contentions of the Parties*

55. For convenience of reference the "Islands clause" of Article III of the 1881 Treaty is set out below in the Spanish and English texts: —

En cuanto a las islas, pertenecerán a la República Argentina la isla de los Estados, los islotes próximamente inmediatos a ésta y las demás islas que haya sobre el Atlántico al Oriente de la Tierra del Fuego y costas orientales de la Patagonia; y pertenecerán a Chile todas las islas al Sur del canal "Beagle" hasta el Cabo de Hornos y las que haya al occidente de la Tierra del Fuego.

As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego.

For the interpretation of this text there are two principal points of departure:

(1) The Argentine attribution is divided into three (or according to another view, that may well be correct, only two) categories, *viz.* (*a*) Staten Island and neighbouring (immediately proximate) islets; (*b*) the "remaining island (*i.e.* other than Staten and islets) that there may be" ("que haya"), and which are *both* "on the Atlantic" *and* "to the east of Tierra del Fuego"; and (*c*) those there may be (equally on the Atlan-

tic) *and* "to the east . . . of the eastern coast ["costas" in the Spanish[23a]] of Patagonia". But according to a different reading of (*b*) and (*c*), fusing them into one category, the requirement is that the island or islands concerned should be both "on the Atlantic" and, simultaneously, "to the east" *both* of Tierra del Fuego *and* "of the eastern coasts of Patagonia"; —in short, it would not be enough for an island (being on the Atlantic) to be to the east of Tierra del Fuego, —it would also have to be to the east of the "eastern coasts" of Patagonia; and *vice-versa*. It therefore springs to the eye that these categories—apart from that comprising Staten Island—however they may be read, are not crystal clear as to what they comprise.

(2) As will appear in more detail presently, Argentina concedes (or does not deny) the self-evident point that the PNL group does not lie east of Tierra del Fuego if that term is confined to the Isla Grande. It is for this reason that she insists that the term, as it appears in the Islands clause of Article III, was meant to embrace both the Isla Grande and the rest of the Fuegian archipelago. Chile maintains that the reference to Tierra del Fuego in that clause was confined to the Isla Grande, but that in any event the PNL group is not covered by any part of the Argentine attribution under that clause.

56. *Meaning of "Tierra del Fuego" (Chile's view)*—Three points are made:

(1) Appealing to those parts of the 1881 Treaty, other than the "Islands clause", in which the term "Tierra del Fuego" appears, Chile claims that, in each such part, this term obviously refers only to the Isla Grande of Tierra del Fuego, and not (or not also) to the rest of the Fuegian archipelago. It must therefore mean the same thing in the Islands clause, since no change of meaning is there indicated. Thus the "without prejudice" clause at the end of Article II specifies "Tierra del Fuego *and* adjacent islands"—[stress added]; consequently it does not include the islands in the term "Tierra del Fuego". Again, Article III (first half) starts with the words "In Tierra del Fuego a line shall be drawn", but this line is the perpendicular from Cape Espíritu Santo to the Beagle Channel, and it is in the Isla Grande alone that it is drawn. A little lower down, the clause continues "Tierra del Fuego divided in this manner", *i.e.* by the perpendicular; and again, it is only the Isla Grande that is so divided. Chile accordingly contends that when (without any indication of a change of meaning) the Islands clause of Article III says "to the Argentine Republic shall belong . . . the other islands there may be . . . to the east of Tierra del Fuego", this must mean islands to the east of the *Isla Grande* of Tierra del Fuego (other than Staten Island and neighbours), —whereas the PNL islands are manifestly to the south of the Isla Grande, not east of it. Also, the separate attribution of Staten Island tends to confirm the view that the expression "Tierra del Fuego",

[23a] This is another place where the Spanish and English texts do not correspond–see nn. 5 and 6-8 above. The Spanish being the authentic text, the word "coasts" has been used for the English of this expression wherever it occurs after this point.

as used in the Argentine attribution under the Islands clause, signifies the Isla Grande, of which Staten Island is not a part.

(2) Chile further points out that while certain maps show "Tierra del Fuego" as including the archipelago, nevertheless most of those that, by a great majority, show this appellation, do so in such a way so to indicate the Isla Grande only, —and these maps are not solely Chilean by origin: a number are Argentine[24].

(3) Señor Irigoyen, the Argentine negotiator, himself said in the speech he made to his National Chamber of Deputies after the conclusion of the Treaty that the broader sense of "Tierra del Fuego"—to include the archipelago—was "its less correct one"—(this speech is more fully considered hereafter—see paragraphs 113-116 *infra*).

57. *The Argentine view as to the meaning of "Tierra del Fuego"* —As previously noted in paragraph 55 (2), Argentina maintains that in the Islands clause (which is the clause, and the only one, in which attributions of islands are made, and which opens with the words "As for the islands"—"En cuanto a las islas"), the signification of the expression "Tierra del Fuego" cannot be limited to the Isla Grande of Tierra del Fuego but must also include the Fuegian archipelago. It may have been a drafting oversight that caused the failure to indicate this in terms, but Argentina contends that the intention is clear, and also appears clearly from the "without prejudice" clause of Article II (see text in paragraph 15 *supra*) where, as already noted, it is stated that Chile's allocation under that Article shall be "without prejudice to what is provided in Article III respecting Tierra del Fuego and adjacent islands". The islands adjacent to Tierra del Fuego could only be the Fuegian islands, —*i.e.* the archipelago. Therefore, even if the term "Tierra del Fuego" itself, as used in the "without prejudice" clause of Article II, meant the Isla Grande, this clause must obviously indicate that Article III, in its "islands" portion, was intended to deal with the islands that were adjacent to the Isla Grande. Accordingly the term "Tierra del Fuego" in that part of the Islands clause that contained the Argentine attribution must be interpreted as if it read "the Isla Grande of Tierra del Fuego and the Fuegian archipelago".

58. *Meaning of "Patagonia"*—As to the expression containing the appellation "Patagonia", interpretation is made difficult by the uncertainty, already noted (*supra*, paragraph 24 and footnote 10), attendant upon the identity of the geographical entity thus named. As there indicated, it could denote Patagonia north of the Dungeness-Andes line ("Patagonia proper"); it could mean Patagonia south of that line and north of the Straits of Magellan; and it could mean Patagonia south of the Straits and co-terminous with the Isla Grande. Both these last-mentioned regions would come within the concept of "Magellanic Patagonia". Or again Patagonia could be synonymous with Tierra del Fuego

[24] See for instance Plate No. 16 to the Argentine Memorial, Nos. 9-11 to the Reply, and No. 7 in the Argentine "Additional Maps and Charts". See also Chilean Plates 7 and 52 for maps of English and French origin.

including the archipelago ("Fuegian Patagonia"). All these identifications seem to have been used in maps of earlier date, travellers' descriptions and accounts; and even as late as 1904, a map drawn by Sir Thomas Holdich (see *infra* footnote 44 to paragraph 89) and published by the Royal Geographical Society, London (Plate No. 11 in the Argentine Additional Charts and Maps), entitled "Sketch Map of Patagonia", comprised the whole territory south of the Rio Santa Cruz—some 140 miles (224 km.) north of the Dungeness-Andes line—as far as Cape Horn. The question for the Court, however, is what did "Patagonia" mean in the Islands clause of the Treaty? The following views were expressed:

(1) *Argentina*—Just as Argentina maintains that the expression Tierra del Fuego in the Islands clause is not confined to the Isla Grande, but must also extend to the rest of the archipelago, because that clause was clearly intended to deal with the Fuegian islands—(and she refers in support of this view to the "without prejudice" clause at the end of Article II, which speaks of Tierra del Fuego "and" the "adjacent islands", which can therefore only mean Fuegian islands), —so also does she maintain that the islands contemplated in the Islands clause must be exclusively Fuegian ones and cannot comprise non-Fuegian islands (other than Staten Island). In consequence, the notion of islands off the "eastern coasts of Patagonia" could not, for the purposes of the Islands clause, relate to any Patagonian islands that did not at the same time have a Fuegian character. This, however, entailed that the description of Patagonia itself, given by Argentina, must necessarily be one that, for the purposes of the Islands clause, virtually equated that region with Tierra del Fuego[25], including the archipelago, and excluded any idea of Patagonia north of the Straits of Magellan, let alone north of the Dungeness-Andes line. (From this identification of Patagonia with Tierra del Fuego it would follow that whatever was east of the latter would also, *ipso facto*, be "east of the eastern coasts" of the former.) In any case, whatever the precise meaning of the term Patagonia, it could not in the context (so Argentina maintained) be held to refer to areas that could not possibly come within the notion of "Tierra del Fuego and adjacent islands".

(2) *Chile* rejects this view on a number of grounds. In the first place, as has been seen in paragraph 56 (1) above, she contends that the very process by which the "without prejudice" clause of Article II of the Treaty, in pointing to Article III, mentions the islands separately from Tierra del Fuego, shows that the latter expression was, in that Article—*i.e.* in the Islands clause—intended to be read as meaning the Isla Grande only. *Secondly*, Chile draws attention to the dilemma created

[25] See Argentine Counter-Memorial, n. 36 on pp. 98-99 generally, where it is stated, *inter alia*, that in the *Base Tercera* of 1876 (the equivalent of the Islands clause of the 1881 Treaty) "the eastern coasts of Patagonia mean the coasts of Southern Patagonia, located between the Strait of Magellan and Cape Horn. For all practical purposes, the term Patagonia is *more or less equivalent, here, to the term Tierra del Fuego*, next to which [*i.e.* in the Islands clause] it is located"—[stress added].

for Argentina by the reference to Patagonia in the Islands clause, and suggests that the reason for this—the reason why Argentina seeks to, as it were, project the notion of Patagonia southwards so as to overlap the Isla Grande—is to be found in her overall concept of the Treaty structure, according to which each Article of the Treaty is autonomous—confined to its own limited area of application (see paragraph 26 above). Thus if it were to be conceded that the Islands clause of Article III makes Argentina any attribution of islands north of the Straits, this major thesis would be contradicted if that clause were given any application to islands the situs of which was not Fuegian[26]. The projection southward of Patagonia was therefore necessary in order to avoid the clear implication that Article III could apply to areas north of the Dungeness-Andes line, or even of the Straits of Magellan[27].

(3) *Chile's view* was consequently the reverse of Argentina's, and was to the effect that it could not be correct simply to equate the notion of Patagonia with that of Tierra del Fuego. This could only give rise to unacceptable redundancies and confusions. What in that event would be the point of specifying the two sets of requirements—namely of being "east of Tierra del Fuego", and "east of . . . the eastern coasts of Patagonia", if the notions of Tierra del Fuego and Patagonia were broadly interchangeable?—and which criterion would prevail, that of being "east of" or that of being "east of . . . the eastern coasts of"? Patagonia must therefore denote something other than Tierra del Fuego, —and here Chile rejected as inadequate or unconvincing the Argentine explanation (footnote 26 above) that if there was duplication it had been effected *ex abundanti cautela* to make sure of covering the whole region, including the archipelago, whatever appellation it was given, —for in that case why two different criteria ("east of" east of eastern coasts of") for the same locality? All this, in Chile's view, pointed to a Patagonia outside Tierra del Fuego, and in any case north of the Straits of Magellan. In support of this, Chile cited one of the only two or three maps which it seemed to be agreed were taken account of by the negotiators of the Treaty (for the others see paragraphs 61 (3) and 90 below). This was the Admiralty Chart No. 554 of the Magellanic region (Map 13 to the Argentine Memorial), founded on the charts of the early explorers, and available in editions ranging from 1832 to 1875, on which the appellation "Patagonia" is confined to the area north of the Straits, while the area south of these is either not given any name or, in the Beagle Channel vicinity (but north of it, not in the archipelago), is called "Tierra del Fuego".

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[26] In her Memorial (pp. 375-377), and repeated in her Counter-Memorial (p. 98), Argentina explains that the mention of the eastern coasts of Patagonia in the third Basis of 1876, and again in Article III of the Treaty, "could only have been made out of abundant caution in order to avoid any doubt which may arise on the multiplicity of the meanings of the terms used".

[27] Since the Court has rejected the Argentinean "autonomous" theory, it follows that islands off coasts north of the Straits of Magellan or of the Dungeness-Andes line are not excluded *a priori* on this ground from falling under the Argentine attribution under Article III.

(4) But Chile did not have to show exactly what Patagonia meant, —only that, whatever it meant, the PNL islands did not, relative to it, satisfy the criteria that would bring them within the Argentine attribution under the Islands clause. The use of the term "coasts", in the plural, "las costas orientales de la Patagonia", suggested that more than one "Patagonia" could have been contemplated, —Fuegian, Magellanic, or even further both. But be that as it may, the essential ingredient of Chile's position about Argentina's attribution, and of the difference between that position and Argentina's, to which the Court now comes, goes beyond the question of the localization of "Patagonia".

59. *The expressions "... to the east of...", and "... to the east of... the eastern coasts of..."—The Chilean view*—With regard to the former of these expressions, Chile, as previously indicated, insists that the effect of the words "to the east of" in relation to Tierra del Fuego was confined to the Isla Grande;—but that even if that appellation was taken to cover the archipelago, it would still remain the case that the PNL group—being in the archipelago—could not be regarded as lying "to the east of" it, *since a group cannot lie to the east of an entity of which it is itself an integral part.* Still less of course could it be considered to lie "to the east of ... the eastern coasts of Patagonia", whatever interpretation might be given to that expression.

60. *The same—The Argentine view*—With the Argentine reply to the Chilean contention just stated, *the heart of the Argentine case is reached.* The Argentine view is that the expressions "to the east of", etc., cannot be read literally, but must be applied in a more generalized form so as to admit of the notion of "in the eastern part of", "on the eastern side of", or "towards the eastern confines (or 'fringes') of...", —the point being, naturally, that the PNL group does in fact lie in the eastern part, or on the eastern side of the archipelago. In support of this contention Argentina puts forward the following principal considerations: —

(1) A literal reading of the text would empty the Argentina attribution under the Islands clause of all worthwhile content—apart from Staten Island and its neighbouring islets; for, according to Argentina, there are no islands in the Atlantic east of the Isla Grande or Patagonia except possibly for a few worthless islets and rocks. Since the 1876 Bases of negotiation, which ultimately figured in the text of the 1881 Treaty almost verbatim, stemmed from an Argentine, not a Chilean, proposal (*supra*, paragraph 25), it cannot be supposed that a statesman of the calibre of Señor Irigoyen, the then Argentine Foreign Minister, who was also the chief negotiator on that side, could have intended to bring about the voluntary handing over of the whole Fuegian archipelago to Chile in return for only Staten Island and a few barren rocks, when Chile was already being given the exclusive control of the Straits of Magellan, and the whole Magellanic area apart from Argentina's Isla Grande triangle. (Here it has to be remembered that Argentina does not admit the vast Patagonian territory north of the Dungeness-Andes line as being a compensating factor: this, according to her view, was, if not

outside the Treaty text, outside the Treaty "deal"; —but the Court has not been able to accept this view—paragraph 29 above.)

(2) It is not only in the context of the north-south Andean, and east-west Dungeness-Andes boundaries, but also in that of the Islands clause that Argentina invokes the "Oceanic", or, here, "Atlantic" principle which, for this purpose, is given concrete form as a "Cape Horn" or "meridian of Cape Horn" principle, on the basis that the Atlantic and Pacific oceans must be regarded as meeting at Cape Horn, and that the territorial claims of the Parties have (in the Argentine view) always been governed by the oceanic doctrine. Therefore, the claims of each side "hasta el Cabo de Hornos" ("as far as Cape Horn") can be satisfied if each receives the islands situated on its own side of the Cape Horn meridian. Argentina discounts the difficulty caused by the fact that this meridian cuts across and divides certain islands (including Cape Horn Island itself, and the island of Navarino) that form an important (and undisputed) part of the south (Chilean) shore of the Beagle Channel, on the ground that she claims only undivided islands wholly situated east of the Cape Horn meridian. (This, it may be noticed, already involves a certain retreat from the strict "meridian" contention.) Accordingly, Argentina maintains that the expression "to the east of Tierra del Fuego" (or "east of the eastern coasts of Patagonia") in the Islands clause must be read as denoting, or inluding, all "whole" islands fringing the archipelago on its eastern (Atlantic) side, east of the Cape Horn meridian. This would cover the PNL group. It would also cover a number of other islands not actually in dispute in the present proceedings, the title to which it is not within the competence of the Court to pronounce upon. Yet they must be named, because it is not otherwise possible to understand the precise nature of the Argentine "Atlantic" contention, and what is meant by the claim that all the islands fringing the Cape Horn meridian on its eastern side were assigned to Argentina under the Isands clause. These islands (all of them, as the Court understands it, actually in Chilean physical possession) are, reading from north to south, those of Terhalten and Sesambre, some 6-7 miles (say 9 km.) south of Lennox Island; the Evout isles some distance further south towards Cape Horn; the Barnevelt isles, perhaps 8 miles (12 km.) east of the Wollaston group containing Cape Horn Island, and in that group, Deceit and Freycinet Islands (see Map B).

(3) *Argentina* also invokes the words in the Islands clause: "on the Atlantic" ("las demás islas sobre el Atlántico"). It is of course evident that the satisfying of this test alone would not be sufficient: the islands claimed must also be "to the east of . . ." etc. Nevertheless, Argentina contends that these words have a certain autonomous effect as indicative of the underlying intention of the Argentine attribution: Argentina was, in principle, to have any islands that were on the Atlantic, as she contends that the PNL islands are.

61. *The Chilean replies* to the above described Argentine contentions must now be indicated. As regards that stated in sub-paragraph (1) of paragraph 60, Chile asserts as follows:

(1) In fact, thre are islands in the Atlantic east of the Isla Grande and off the Patagonian coasts further north—see *infra*, sub-paragraph (3); —but Chile points in any event to the language of the Islands clause ("the remaining islands that there may be"—Spanish "las demás islas que haya") as lacking in positive assertion on the subject—(the Argentine rendering of this passage into English, "*such* [stress added] remaining islands as are . . . to the east", etc., involves the same element of uncertainty differently expressed, —but this is a matter to which the Court will return).

(2) Furthermore, Chile argues, since Argentina received under the Treaty the whole Patagonian coast from the Río Negro downwards, and again the whole eastern coast of the Isla Grande, it was to be expected that she would also receive any islands that there were off those coasts, and this was that what the Islands clause brought about in Argentina's favour. To Argentina's contention that islands off mainland or quasi-mainland coasts automatically go with the mainland and do not require separate attribution. Chile's view was that in a Treaty such as that of 1881, a principal aim of which was finality and completeness, it would be entirely natural to deal separately and specifically with any islands off the coasts of the mainland territories it attributes. This was the object of the separate mention of Patagonia in the Islands clause, —and the argument that, in the context of that clause, Patagonia must be equated with Tierra del Fuego because, otherwise, non-Fuegian islands would be brought in, simply begs the question, besides being open to the objections indicated in paragraph 58 (3) above.

(3) "*las demás islas*"—It seems desirable to explain this point a little more fully. Argentina's contention that if Tierra del Fuego is deemed to be synonymous with the Isla Grande, then no islands other than the separately attributed Staten Island lie to the east of it, is categorically denied by Chile. The latter brings to bear as witness several maps, including the Colton and Martin de Moussy maps (Chilean Additional Evidences, Maps Nos. 207, 208, 209 and, especially, 210), which clearly show the Aurora, Wallis, New Georgia and Clarigos Islands lying east of Staten Island. In the course of the oral proceedings Chile claimed that the authority of the de Moussy map was all the more impressive in that Señor Irigoyen stated that it was one that he had consulted (speech referred to in footnotes 4 and 9 *supra*, at pp. 91 and 133)[28]. Chile also points to a number of other islands as qualifying under the Islands clause of Article III, such as the Malvinas (Falklands), the New Year and Dampier Islands, Observatorio Island, etc. Argentina denies that these are Fuegian islands within the meaning of Article III, and makes the further point noted in the footnote below[29]. With respect to any islands lying off "the eastern coasts of Patagonia", Argentina not only asserts that they would in any event be Argentinean by virtue of

[28] Oral Proceedings, VR/3, the page numbered "92/113".

[29] Argentina makes the point that it could not possibly have been the intention, in a purely Argentine-Chilean Treaty, to make attributions of islands the title to which might be the subject of disputes with third countries.

her attribution of "Patagonia", but she also supplied a map (Argentine Counter-Memorial Map No. 84) designed to show that any such islands were merely barren reefs or "toy" islands of no consequence. Chile denies that the size of the islands concerned is relevant, and calls attention to the incidents involving the "Jeanne-Amélie" and the "Devonshire" (see footnote 4 *supra*) to show that Argentina had an interest in certain islands owing to the presence of guano. Chile's object, in short, is to show that notwithstanding the lack of any positive affirmation in the Islands clause as to the existence of islands east of Tierra del Fuego, etc., the Argentine contention that there are in fact none that could reasonably qualify is wrong.

62. *As to the "Atlantic" principle* (sub-paragraphs (2) and (3) of paragraph 60), *Chile* makes the following points:

(*a*) She denies the existence of any such principle, and in any case its applicability to the Islands clause. She does not argue that the Treaty is devoid of any "Atlantic" *aspect*, but maintains that, within the Treaty area, its scope is confined to the concave arc comprising the eastern coast-line of the continent from the mouth of the Río Negro to Cape San Diego and Staten Island[30]. She also maintains that, to the extent to which it is applicable, the principle is essentially a coastal, and not, as such, an oceanic one. The coasts concerned are involved *because they face east*, not because the ocean that washes them happens to be called the Atlantic. Chile denies the applicability of the principle to any islands *south* of the Isla Grande, or to coasts other than mainland coasts, or to oceans as opposed to coasts (and certain particular coasts, at that). Chile has also pointed out that (see paragraphs 26 and 58 (2) above) it is precisely Argentina that has insisted on the self-contained and non-overlapping character of each provision of the Treaty. Hence the existence of an underlying Atlantic element in one Article of the Treaty would not imply a "carry-over" of it to another. Any such element would have to exist independently, for each provision alleged to be governed by it. The way in which the Dungeness-Andes and Espíritu Santo/Beagle Channel lines were drawn, particularly in the vicinity of the Atlantic end of the Straits of Magellan, no doubt reflected an Argentine desideratum of keeping Chile removed from the eastern, mainland, coast of the continent; and the same consideration would have motivated the allocation to Argentina of the eastern half of the Isla Grande; —but there was nothing to suggest the application of the same element in the case of island coasts situated south of the continent, such as those of the PNL group which in any case rank only dubiously as being "on the Altantic" ("sobre el Atlántico")—see further, paragraphs 65 (*e*) and (*f*) below.

(*b*) Chile asks why, if Argentina's view of her entitlement to all the islands fringing the archipelago on its eastern side down to Cape Horn is correct, the same words ("as far as Cape Horn") do not appear in her (Argentina's) attribution, as they do in Chile's, of "all the islands

[30] See further as to this, *infra*, paragraph 66 (2) (*b*) and n. 37.

to the south of the Beagle Channel up to Cape Horn"? The expression "to the south of the Beagle Channel" was almost enough in itself to imply Cape Horn, only some 70-80 miles (112-128 km.) to the south, even without the mention of it, —or at least to point in that direction, —whereas "to the east of Tierra del Fuego" pointed in quite a different direction, and really did need a specific mention of Cape Horn in order to convey the idea suggested on the Argentine side. It might also be asked why if the Argentine "Atlantic" view is correct, the Chilean attribution of all islands south of the Beagle Channel was not limited to those lying to the west of the Cape Horn meridian, special provision being made for those that were cut by that meridian.

(*c*) In short (Chile argues), Argentina is really seeking to do two things here. First, she is attempting to introduce a vertical, meridian, principle of division, despite the fact that any such notion is wholly foreign to the Islands clause which proceeds by attribution, the vertical process having been deliberately abandoned when the Isla Grande perpendicular was stopped at Point X on the Beagle Channel, and a horizontal one having been implied in the attribution to Chile of all islands to the south of the Channel. Secondly, Argentina is attempting to establish as the real underlying principle of her attribution the notion (see paragraph 60 (3) above) that this attribution can be read as if it stopped at the words "on the Atlantic", and as if the requirement of also being "to the east of Tierra del Fuego", etc., did not exist. This, however, could not be correct, for the expression "the other islands there may be on the Atlantic" would be meaningless if not completed by an indication of where in the Atlantic they may be. The words "[that] there may be" required such an indication since the Atlantic constitutes an extensive area[31]. The designation of east of Tierra del Fuego, etc., is therefore an indispensable part of the attribution.

(*d*) Finally, if there was any "Atlantic" factor implicit in the Islands clause, it was satisfied by Argentina being attributed Staten Island and the other islands there might be "to the east"—(as Chile maintains)—of the Isla Grande and of "the eastern coasts" of Patagonia north of the Straits of Magellan.

63. *The allegedly unallocated western islands*—There was one further point that should receive mention here, although it will be convenient to postpone consideration of it until Chile's attribution under the Islands clause comes to be dealt with. This was an Argentine argument to the effect that unless the words "Tierra del Fuego" were construed as covering not merely the Isla Grande but the archipelago also, and unless the expression "to the east of Tierra del Fuego" was interpreted as meaning, or as including, the notion of "in the eastern part" or "at the eastern side" or "on the eastern fringe on . . ", it would be found that Chile's attribution of the islands "to the west of Tierra del Fuego" left

[31] In connexion with the cartography of the case, Chile has also pointed to the existence of some evidence of an Argentine aspiration to interpret her attribution as if it specified islands south, rather than east, of Tierra del Fuego, —see as to this paragraph 157 (*b*) *infra*.

certain western islands, though unquestionably Chilean, unallocated under the Treaty, and this could not have been intended. Hence the Argentine interpretation must be allowed, —and if in the west, then also in the east. This contention is considered in paragraphs 100-102 below.

(iii) *The Court's view of the Argentine attribution*

64. It can be seen from the foregoing statement of the Parties' contentions that the interpretation of the Argentine attribution under the Islands clause of the Treaty is not a simple matter. The Chilean version, although not itself entirely free from difficulty, is the more normal and natural on the basis of the actual language of the text. It amounts to this,—that the PNL group does not come within the Argentine attribution because, whether or not it is "on the Atlantic", and whether or not the Atlantic, in the context, means the ocean that washes the southern shores of the continent, the PNL group is not situated "to the east of Tierra del Fuego"—*i.e.* of the Isla Grande;—and even if Tierra del Fuego should here be regarded as comprising the archipelago, the group is part of the archipelago and not situated east of it. This interpretation is certainly not manifestly incorrect: it is the one that would in principle prevail, unless displaced by very persuasive considerations.

65. On the other hand, while it cannot by any means be said that the Argentine interpretation is wholly implausible, or that it could not possibly be correct having regard to all the circumstances, it is attended by many and serious difficulties, most of which have already been brought out above in the course of stating the Chilean view of the matter. The Argentine interpretation depends on subjecting the text to a process, not exactly of amendment, but of what is known as emendation, *i.e.* adjustment to accommodate a different outlook. This is in no way an illegitimate proceeding as such, —but its acceptability in any given case must depend on how compelling are the reasons that operate to support it, and also on the degree of adjustment entailed. The following are the adaptations that would be required:

(*a*) Starting with the major points, there is first the need to read the expression Tierra del Fuego—denoting, in the context of all the other territorial provisions of the Treaty, the Isla Grande only—as meaning, or including, in the particular context of the Islands clause, the archipelago south of the Isla Grande. This is not *per se* an unreasonable notion, —still, a definite adjustment that imposes a strain on the text has to be made. Next, and much more difficult, the words "to the east of" have to be understood as if they were "in the eastern part of". Thus an entire phrase, the actual wording of which is "to the east of Tierra del Fuego" has to be taken as if it read "in the eastern part [or "on the eastern fringe"] of the archipelago of Tierra del Fuego", —which is, on the face of it, a very different thing: it converts something that, whatever its exact effect, certainly does not include the PNL group, into something that could do so; but at the same time it gives the impression of having been especially formulated to achieve that end, —in short it

represents what is sometimes known as a "self-serving" process, —the result causes the cause, instead of deriving from it. Even allowing for the possibility that the Spanish expression "al Oriente de" may be capable of some such meaning as "towards the east of", the interpretation involved is not the natural one. It must also be asked what, according to that interpretation, the point of reference for determining the "eastern part" would be. How far east of centre, and where would the centre be?

(*b*) Next, there is the problem of "Patagonia". If the Argentine view is correct, and Patagonia north of the Straits of Magellan has to be excluded on *a priori* grounds, then it would seem that, here, Patagonia is to be equated with Tierra del Fuego, either with or without the southern archipelago, depending on what "Tierra del Fuego" must be taken to cover; —but with this difference, that the relevant qualification is "to the east of . . . the eastern coasts of" Patagonia/Tierra del Fuego, or, to transpose it into Argentinian terms "in the eastern part . . . of the eastern coasts of" Patagonia/Tierra del Fuego ("en la parte oriental . . . de las costas orientales de la Patagonia/Tierra del Fuego"). This hardly even makes sense, and certainly does not lend itself to any precise interpretation. It seems a curious notion, or at any rate a tautologous one, that an island should be both east of a locality and also east of the eastern coasts of the same locality. The actual phrase "to the east of . . . the eastern coasts of", though clumsy, and at least concealing a redundancy, is intelligible on the assumption that the Patagonia referred to is the region of Patagonia lying between the Dungeness-Andes line and the Straits of Magellan, for this has not only eastern but western (Pacific) coasts as well. If this is not the Patagonia referred to, then the difficulty would remain that Patagonia would be doing double duty for Tierra del Fuego. This difficulty disappears if the Chilean view is correct that Patagonia, in the context, includes areas north of the Straits. In either case, however, an obvious dilemma for Argentina persists, the nature of which has been stated in paragraph 58 (2) above.

(*c*) The term "coasts" is also not free from difficulty. The expressions "coasts" and "the eastern coasts of" suggest something in the nature, more or less, of continuous coastlines, such as those of a mainland or major island territory. These notions are inappropriate and hard to apply in the case of an archipelago with small scattered units separated by considerable stretches of sea.

(*d*) The Argentine interpretation involves other uncertainties which, though they may be speculative, are nevertheless real. The expression "the other" (or "remaining") islands ("las demás islas"), coming as it does immediately after the attribution of Staten Island and neighbouring islets, coupled with the rather insistent indications of an eastern orientation, suggests—at least as the initial idea to which the mind is directed—the notion of something in the same general direction as Staten Island, and not something in the quite different direction of the PNL group. The "que haya" qualifying the "y las demás islas" enhances this impression—although Argentina argues that her attribution, beginning with Staten Island, then works back *westwards* and southwards to

the PNL group and the islands near Cape Horn. But this view is not easy to reconcile with the "que haya" because, while there might have been doubt about the presence of pertinent islands east or north of Staten Island, there could have been none regarding the existence of those of the PNL group and the other islands between them and Cape Horn. The expression "que haya" was therefore quite an inappropriate one to use if it was this group and these islands that were intended to be denoted.

(*e*) In the same category of inappropriate or inapt expressions, when used in connexion with the PNL group, is that of being "on the Atlantic" ("sobre el Atlántico"). In the first place, the Court has received the strong impression that what the spokesmen and negotiators of the Parties in the past had chiefly in mind when they referred to, and when they were discussing, the question of a Chilean presence, or non-presence, on the Atlantic, were those areas of the ocean that lay along the eastern mainland seaboard of the continent, and not what was often known loosely to mariners at that time, and still figures in some geographical dictionaries, as the "Southern Ocean"—a belt of sea circling the globe almost continuously at about the level of parallels 50°-60°, and absolutely so at the level of the parallel of Cape Horn (about 56°). The idea is exemplified in Chilean Plate No. 34—(and the map itself is a quasi-official Argentine one[32])—where the ocean south of the Isla Grande is described as "Oceano Antártico". It is also well-described in paragraph 101 (in Chapter I) of the Chilean written Reply (pp. 70-71) which reads as follows:

> First of all it is necessary to call attention to the fact that on the maps of the 18th and 19th centuries the term "Atlantic Ocean" was commonly applied only to the sea washing the coasts on the northern sector of the arc of a circle described above (see the cartography cited in "Further Remarks . . .", pp. 78-9) [33]. The oldest maps distinguish between the Atlantic Ocean, to the north of this arc of circle, and the sea area washing the southern islands, to which a variety of names are applied: "Novum Mare Australe", "Mare Magellanicum", "Nouvelle Mer du Sud" (Chilean Plates 141, 143, 144, 149, 152)[34]. This distinction was to persist for the better part of the 19th century. For example, it has been seen that in 1878 the map illustrating the Fierro-Sarratea Treaty of 6 December 1878 shows that by the expression "Sea and coasts of the Atlantic Ocean and the adjacent islands" the Parties did not have in mind the regions situated to the south of Tierra del Fuego and of Staten Island (Ch. Plate 11; Ch. C.M. p. 47, para. 22). Again the map of Julio Popper illustrating a lecture given to the Argentine Geographic Institute in 1891—ten years after the conclusion of the Treaty of 1881—was to produce the new name "Argentine Sea" for what the author himself described as "the *unnamed martitime extension* which bathes the southern extreme of the Republic and which extends from Staten Island to Cape Horn and from the Beagle Channel to the Atlantic Ocean" (Ch. Plate 55; "*Some Remarks* . . .", [35] p. 46).

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[32] Published in 1885 (see further, paragraphs 148 and 157 (*d*) below) by the Argentine National Geographical Institute "under the auspices of the . . . Honourable National Government". It shows the PNL group as Chilean.

[33] The square bracketed numbers for this and the three succeeding notes indicate explanations not given in the original text. The reference here is to the Chilean volume of "Further Remarks concerning the Cartographical Evidence".

[34] Note in the Chilean written Reply: "For the views of the navigators in the 18th century, see Further Remarks . . ., p. 78."

[35] The reference is to the *first* of the special Chilean volumes on cartography.

This map produced by Popper is all the more significant because it emanated from an author who was particularly favourable to the Argentine claims in this region (cf. Ch. Mem. p. 85, para. 2). The name "Mar Argentino", distinct from that of "Oceano Atlántico" is also to be found on another official Argentine map of the 19th century (Ch. Plate 125)[36].

Accordingly, Chile, while disclaiming any intention of drawing a conclusion about the geographic limits of the Atlantic Ocean, suggests that the facts cited confirm the view that when the Argentine Government laid claim to the "Atlantic coast" that claim related to the seaboard in the shape of an arc of a circle formed by that of Patagonia, the east coast and south-eastern extremity of Tierra del Fuego, and Staten Island, as mentioned in para. 62 (*a*) above.

(*f*) Still, since these matters are speculative, let it be assumed that it is the Atlantic—at least in the sense of not being the Pacific—that washes the southern shore of the Isla Grande, east of the Cape Horn meridian. Nevertheless the word "on", in the concept of being "on the Atlantic", is imprecise, and capable of more than one interpretation. It must therefore remain a matter for doubt whether this description (which suggests something of which the primary geographical characteristic would be that of being so situated) is really one that would immediately direct the mind to the islands of the PNL group. These are much more readily thought of as being akin in this respect to islands in a river mouth or in the outflow of an estuary or delta. The description "sobre el Atlántico" is particularly inapt with regard to Picton Island, which is the one that, by dividing the eastern Beagle Channel into two arms, creates the problem of what its eastern course is to be deemed to be, and which is partly screened from open Atlantic waters by Lennox and Nueva Islands. If Picton is "on the Atlantic", it could with almost equal plausibility be said that some islands even further up the Channel are so (or are "on the Pacific" if west of the Cape Horn meridian), since it is sea water that surrounds them, and it comes from the Atlantic or Pacific as the case may be. In short, considering that the group of three islands is to be treated as a unit, its components seem to present themselves far more as islands appertaining to the Channel than as being "on the Atlantic".

66. The above-described difficulties and obscurities, no one of which might be actually decisive in itself, must constitute, cumulatively, a serious obstacle to the positive acceptance of the Argentine thesis, even if not necessarily calling for its complete rejection. The court will now review the considerations, already partly referred to, that have been advanced from the Argentine side as grounds for ignoring this obstacle. These seem to fall into three main categories.

(1) *Weaknesses of the Chilean interpretation of the Argentine attribution*—Briefly, there is the question of what islands there are actually present east of the Isla Grande or of the eastern coasts of Patagonia and of what kind: there is the question described in para-

[36] With regard to the "Popper" and other maps here mentioned, see hereafter, paragraph 157 (*d*), and n. 118.

graph 63 above of the effect of Chile's allocation of the islands "to the west of Tierra del Fuego" if no gloss is placed on that expression, and, if one is, what repercussions that would have for the corresponding "to the east of . . ." (this question is further considered in paragraphs 100-102 *infra*): there is the fact that the PNL islands can, from one point of view, be said to be "on the Atlantic", though this does not suffice of itself to bring them within the Argentine attribution: there is the fact that islands do have coasts; —and so on. Finally, the Chilean interpretation does not wholly dispose of the problem of the identity of "Patagonia", —but this arises chiefly from the way the cause is drafted, although the Argentinean interpretation of the expressions "Tierra del Fuego" and "to the east of" aggravates the problem. But, when all is said and done, it remains the case that the Chilean interpretation, though leaving certain things not fully explained, gives rise to far fewer and less serious difficulties, especially cumulatively, than the Argentine. At least it provides a reasonable basis for affirming that, whatever else does or does not come within the Argentine attribution, the PNL group does not.

(2) *The Atlantic principle*—The following points are material:

(*a*) It is evident that the validity of the Argentine view of the Islands clause depends on, and largely stands or falls by, the applicability to that clause of the Atlantic principle, —and even so, it would be no easy matter for the interpretative process to absorb the textual adjustments—almost transformations—that would be required in order to give effect to it. This is because the Argentine view comes very close to turning the presence of an island on the Atlantic into a condition sufficient in itself, if the island is east of the Cape Horn meridian, —see paragraph 60 (2) and 62 (*c*) *supra*.

(*b*) It has already been indicated (*supra*, paragraph 22) that there is no real ground for postulating the existence of an accepted "Oceanic" principle (ultimately deriving from the very *uti possidetis* which, as such, the Treaty was intended to supersede) figuring as something that must *a priori* govern the interpretation of the Treaty as a whole. Particular parts of it, such as those relating to the boundary lines defined in Articles II and III, were clearly based on Argentine desiderata relating to the Atlantic coast in those particular localities[37]; —but since the underlying balance of the Treaty as a whole was (see paragraphs 29-31 above) the polarity Patagonia/Magellanic area and control of the Straits, any "Atlantic" motivations are, the Court thinks, to be given effect to only in respect of the individual Articles that clearly show this intention

[37] Thus when, on the same occasion as that described in paragraph 34 above, Señor Irigoyen told Señor Barros Arana that "he could not accept that Chile's dominion should extend to any point on the Atlantic *coast*" [stress added], it was clear from the context that this was in connection with the boundary at the Atlantic end of the Straits of Magellan, which was almost exclusively the subject of this very long and full report (Chilean Annex No. 22), —and it contains no record of any *discussion* about the islands question. This also seems to emerge clearly from the reports made to their Government by the Chilean representatives in Buenos Aires (Señores Lira and Barros Arana) in 1875 and 1877, that figure as Chilean Additional Annexes 532-536; —and see further, n. 42 below.

by reason of their method of drafting or content. This must especially be the case on the basis of the Argentine non-overlapping view of the Treaty (*supra*, paragraphs 26, 58 (1) and 62 (*a*)). The Islands clause of Article III does not exhibit this element, —or if it does, seems to do so only by the attribution to Argentina of Staten Island and the other islands east of Tierra del Fuego (whether the Isla Grande or the archipelago) and east of "Patagonia"; —while the attribution to Chile of "*all* [stress added] the islands south of the Beagle Channel" seems positively to exclude the east of Cape Horn/west of Cape Horn principle of division, by attributing to Chile all those islands that in fact are situated south of the Beagle Channel "as far as Cape Horn", irrespective of whether they lie east or west of the Horn.

(*c*) A good deal of stress has been laid by Argentina on an alternative proposal for submitting to arbitration the question of the title to most of the Isla Grande and the archipelago, that was put forward from the Argentine side in May 1881, at a time when it seemed doubtful whether agreement on the eventual Treaty of July 23 would be reached, and which was taken up again temporarily after the signature of the Treaty in case it should fail to be ratified. From the fact that the area thus to go to arbitration included (but only with much else besides) the eastern archipelago islands—except Staten Island—down to Cape Horn, the deduction contended for was that Argentina was then still claiming those islands, and that this claim must therefore be regarded as having been given effect to in her attribution under the Treaty. The Court is unable to follow the logic of this reasoning. A map displayed at the oral hearing, in order to illustrate the point, showed quite clearly that, had the matter been referred to arbitration, virtually the whole area ultimately covered by Article III of the Treaty would have been thrown open to mutual claims by each Party, to territories and islands both east and west of Cape Horn, subject only to one of the conditions of the proposed arbitration, namely the one that read "Tierra del Fuego and the islands will be divided between the two Republics, in accordance with the terms agreed upon by the respective Chilean and Argentine negotiators—Señores Barros Arana and Irigoyen—in July 1876" —(Chilean Annex 36 (D), on p. 81). But (*vide supra*, paragraph 25) this was the very same "*Base Tercera*" that was finally embodied, virtually without change, in Article III of the 1881 Treaty. Consequently, the arbitration proposal, put forward to meet the possible non-signature or non-ratification of the Treaty, left the islands question exactly where it already stood, and was still to stand when, in due course, the signature and ratification of the Treaty did come about; —and thus it can provide no useful indication whatever as to the interpretation to be given to the Argentine attribution under the Treaty. What it does suggest, on the other hand, is that no *a priori*, or strict, "Oceanic" principle governed the Parties' respective attributions; —otherwise there would have been nothing, or very little, to arbitrate about.

(3) *Contemporary or subsequent official statements or declarations*—Argentine pleads various statements and declarations of

statesmen and others, tending to show an intention to obtain for Argentina the Atlantic-side islands down to Cape Horn, or a belief that the 1881 Treaty had the effect of allocating her these. Certain such statements or declarations will be considered later, but the Court has already, in paragraph 48 above, given a preliminary indication of its general attitude to this kind of evidence, particularly when it is confused or contradictory, and yet, if relied on, would have the result of putting on a text quite a different construction from that which it apparently bears on the face of it. Especially must this be so where the alleged meaning is one that could so easily have been expressed in terms, if really desired and intended. That understandable motivations, political or other, may have prevented this, or rendered it difficult, can serve to explain, but hardly to cure, the insufficiency. A single example will be enough at this stage to illustrate the kind of difficulty the Court finds. In his long address to the Argentine Chamber which the Foreign Minister, Señor Irigoyen, gave in explanation of the 1881 Treaty, about a week or ten days after its signature, one remark that he made, amongst others to be noticed later (see paragraphs 113-116 below), was the following:

> We bore in mind the political consideration of maintaining our jurisdiction over the Atlantic coasts, and we have achieved this. These coasts extend for approximately 1,500 miles . . . and they will remain under the exclusive jurisdiction of this Republic, whose flag will be the only one flying as a symbol of sovereignty, from Río Negro down to the Strait and Cape Horn.

Yet only a few weeks later, on 18 September 1881, the Chilean Foreign Minister, Señor Valderrama, equally giving an explanation of the Treaty to his Chamber, spoke as follows:

> The Treaty ensures for Chile dominion of the Straits of Magellan, the major part of Tierra del Fuego and all the islands to the south of the Beagle Channel . . . in other words, the Straits and all the territories extending to the south, with the exception of a section of Tierra del Fuego bathed by the Atlantic and the islands of los Estados, belong to Chile.

It is clear that these two statements, in so far as they relate to the islands, are not only incompatible, but say almost diametrically opposed things. Since there can be no question but that both were made in perfect good faith and represented the genuine conviction of the speakers, the Court can only regard them as cancelling each other out, so that it would be difficult to draw any certain deduction from either.

(iv) *The "Valderrama proposal"*

67. By way of addendum, mention must be made of an episode in the negotiations for the Treaty of 1881, the importance of which was much insisted upon by Argentina, namely the affair of the "Valderrama proposal". The story is long and involved; but briefly, in the course of the negotiations for the Treaty taking place in the period May-July 1881, the Chilean Foreign Minister, Señor Valderrama, on 3 June, proposed an amendment of the Islands clause of the draft treaty (the *Base Tercera* of 1876—see *supra* paragraph 25) which, had it been accepted by Señor Irigoyen—and it was not—would (according to Argentina) have had the effect either of making it quite clear that the PNL group of islands (or

the category of islands to which these belonged) did *not* come within the Argentine attribution; —or else (but the practical result is much the same) of removing the group, or the category concerned, from that attribution. Argentina has contended that this was a sort of last-minute attempt by Chile to so to speak bring herself on to the Atlantic by taking certain Atlantic islands out of Argentina's attribution and transferring them to her own. (But here at least, a *non-sequitur* is involved; for so far as the PNL islands are concerned, mere removal from the Argentine attribution (if such had been the effect) would still not, of itself, have placed them in the category of being south of the Beagle Channel.)

68. Chile contended that, in fact, the effect of the Valderrama amendment, even had it been adopted, would not have been as Argentina maintains, and that the Argentine attribution (as it stood in the Bases of 1876, and was to remain in the Treaty as signed) would not have undergone any alteration of substance as a result of the proposed amendment, —because (*inter alia*) the Spanish text of the proposed amendment did not materially differ from the original 1876 Basis. *Prima facie* it seems to the Court that this view is probably correct, since the comparison of the three texts concerned (1876 Basis, Valderrama proposal, and Treaty text that appears on pp. 158-9 and 172-3 of the Argentine Counter-Memorial) seems to show that the only real difference was that, for the concept of "demás islas que haya sobre el Atlántico al Oriente de la Tierra del Fuego", etc., there was substituted that of "demás [*islotes*] que haya sobre . . .", etc.—islets or small islands. The Court is unable to see that this change implies that those *other* ("demás") islets or small islands were also to be confined to the category mentioned just before, of islets or small islands immediately proximate to Staten Island, so as to exclude from Argentina's attribution any other Atlantic islands, amongst which she numbers the PNL group. This would merely have been to make the same allocation of the islets or small islands near Staten Island twice over, and also to deprive the words "to the east of Tierra del Fuego and eastern coasts of Patagonia" of any independent signification. Clearly, whether the case was one of islands, small islands, or islets, the word "other" implied some category additional to, and different from, that of those in the near vicinity of Staten Island.

69. However, let it be assumed for immediate present purposes that this view is wrong, and that the Valderrama amendment, if adopted, would have had the effect Argentina contends for. On that basis then, Argentina puts forward an argument which the Court had not found it easy to follow, but which seems to amount to this—namely, that because an amendment under which—so Argentina contends—the PNL group would have failed to come within her allocation was *not* accepted, and the original text was restored, *therefore* it follows, or it must be assumed, that this original text (Basis of 1876) did place the group within the Argentine allocation, and consequently that the Treaty attribution, the wording of which was identical with that of the 1876 Basis, did so too.

70. The Court is unable to admit the logic of this argument which seems to involve another *non-sequitur*, or at least an inference of such an uncertain nature that it could not possibly prevail over the considerations that lead the Court to hold the attribution of the PNL group to Argentina under the Islands clause of the Treaty not to be established. To put the matter in another way, —if it appears not to be established that the Treaty, as it stands, gives Argentina the group, the fact that a previous, rejected version would *even less* have done so becomes irrelevant and without interest. It simply means that according to neither version was Argentina allocated the group: it certainly cannot be argued that because the one did not, the other necessarily did.

71. The Court has thought it right to go into this matter in some detail because the Argentine contention has been made the foundation of a challenge to the probative value of certain Chilean maps and documents to which the Court will come later. These are said to be based on the rejected Valderrama amendment, not the final Treaty text, —the underlying implication being that the former did not give Argentina the PNL group, whereas the latter did. Hence the evidential value of these maps and documents is said to be nil. The fallacy involved is the same: if in any event the correct (Treaty) text does not establish the group as Argentinean, then a map or document that equally does not do so cannot be invalidated in that particular respect merely because it was based on a version of the Treaty that was not accurate, —for even if it had accurately reflected the Treaty text, the latter itself failed to establish the group as Argentinean. If analysed, Argentina's contention seems to amount to this, —that because, in her view, the Treaty should be read as allocating the PNL group to her, any map or document that does not designate the PNL group as Artentinean cannot be consonant with the Treaty, or must be based on an earlier incorrect version of it. Leaving aside for later consideration the question whether the maps and documents in question really were so based, the underlying postulate involved in this argument, namely that the correct text gave Argentina the PNL group, is one which, of course, assumes exactly what has to be proved, and what the Court thinks has not been.

72. The Court realizes that the whole purpose of this Argentine contention is, precisely, to show by inference, that this in fact was what the Treaty did, —but the Court is not convinced that there is a sufficient difference between the two texts concerned (see paragraph 68 above), or that the inference is sufficiently clear, to warrant this conclusion. What might be called the Valderrama argument could never be enough by itself to establish the Argentine case, —and even regarded as a contributory factor, with others, it is inadequate to overcome the powerful considerations operating *contra* that the Court has drawn attention to earlier.

(v) *The Protocol of 1893*

73. Finally, before leaving the question of the Argentine attribution under the 1881 Treaty, the Court must deal with something which,

though it falls outside the Treaty as such, both in date and content, has been much insisted upon by Argentina as allegedly throwing a strong light on an important point affecting the intepretation of the Treaty generally, and the Islands clause of it in particular.

74. In support of her contention that the entire Treaty of 1881 must be regarded as governed by an underlying "Oceanic" principle which, prevailing over all else, must cause each of its provisions to be read suject to an implied rule of "Atlantic coasts and islands to Argentina, Pacific ones to Chile", Argentina has attributed great prominence to the Protocol signed on 1 May 1893 between the two countries (the text of which is given in Chilean Annex 62, pp. 189-191). It specifies the bases and procedural details for carrying out the two demarcations on the ground contemplated by the Protocol, —namely those along the Cordillera of the Andes (Article I of the Treaty) and the perpendicular dividing the Isla Grande of Tierra del Fuego (first half of Article III). The Treaty did not contemplate any demarcation along the Beagle Channel or in the region of the islands south of the Isla Grande. But notwithstanding these facts, and the further fact that, accordingly, the Protocol of 1893 was confined entirely to the two demarcations just mentioned (Andes and Isla Grande)[38], Argentina has argued that the Protocol embodied a general confirmation of a comprehensive "Oceanic" principle obtaining between the Parties and operating, as Chile has put it, as a sort of *jus cogens* of the 1881 Treaty. This argument Argentina derives from the terms of Article II of the Protocol, which came after an Article I that consisted partly of a verbatim recital of the first sentence of Article I of the 1881 Treaty (Andes boundary) and partly of a detailed spelling-out of the effect of this sentence relative to the division along "the line of the highest peaks of the Cordillera of the Andes". Then came Article II of the Protocol, which read:

> The undersigned declare that, in the opinion of their respective Governments, and according to the spirit of the Boundary Treaty, the Argentine Republic retains her dominion and sovereignty over all the territory that extends from the East of the principal chain of the Andes as far as the Atlantic coasts, just as the Republic of Chile over the Western territory as far as the Pacific coasts; *it being understood that, by the provisions of the said Treaty, the sovereignty of each state over the respective coastline is absolute, in such a manner that Chile cannot lay claim to any point towards the Atlantic, just as the Argentine Republic can lay no claim to any toward the Pacific* [stress added]. If in the peninsular part in the South, approaching parallel 52° South, the Cordillera should be found penetrating among the channels of the Pacific there existing, the Experts shall undertake a survey of the ground in order to fix a dividing line leaving to Chile the shores of these channels, as a result of which surveys both Governments shall determine the line amicably.

It is the words italicized in this passage that Argentina sees both the affirmation and the confirmation of the "Oceanic" principle as having to be read into all "the provisions of the said Treaty".

75. There is some force in this view. Yet the Court feels unable to give so wide and general a scope to a phrase that is so evidently set in a

[38] That this was so even according to the account given by Argentina herself can clearly be seen from paragraph 26 on p. 287 of the Argentine Counter-Memorial.

particular and limited context, —that of the Andes Boundary, as appears quite clearly both from the Article which preceded that phrase (*i.e.* Article I of the Protocol, described above), and also from the sentence that immediately follows the one in Article II that has been italicized, which equally related to the Andes boundary. The same applies to the opening part of the passage quoted, in which the reference to "the spirit of the Boundary Treaty" is confined to the consequences of the Andes boundary (Article I of the 1881 Treaty). Especially would an extension to the islands be unwarranted, given that the Protocol nowhere mentions these, and has no reference to them at all.

76. Indeed the Court thinks that the way the Protocol is arranged tends, rather, to confirm the conclusion it reached earlier, namely that the 1881 Treaty did not embody any all-embracing "Oceanic" principle, but simply ensured an Atlantic-Pacific *outcome* in particular localities, namely in the Andes, the Atlantic end of the Straits of Magellan, the eastern coast of the Isla Grande, and Staten Island. In this connexion, it is noticeable that Article IV of the Protocol, which provided for the demarcation in the Isla Grande of the perpendicular from Cape Espíritu Santo to the Beagle Channel, made no actual mention of any oceanic basis of division, presumably because this resulted *de facto* and automatically from the wording of the first half of Article III of the Treaty, which provided that the Isla Grande, divided by this perpendicular, should be "Chilean on the western side and Argentine on the eastern". Consequently, so as not to bring Chile on to the Eastern—*i.e.* Atlantic—side in the Bahia San Sebastián (see Map B), Article IV of the Protocol, by taking as the northern starting point of the perpendicular the middle one of three hillocks visible from the sea at Cape Espíritu Santo, simply effected a displacement of the line by about one mile to the west. But in the Andes it was necessary to be more precise, because of the way in which certain valleys and inlets of the Pacific cut across the north-south line of the peaks and *divortia aquarum* of the Cordillera. However, to balance the modification made in favour of Argentina over the Isla Grande coast at the Bahia San Sebastián (*vide supra*), Article II of the Protocol effects a modification in favour of Chile by means of the passage beginning "If in the peninsular part in the South . . ." as above quoted. For its part, the Court does not see in these (agreed) modifications anything that could bring about a change in the basic character of the 1881 Treaty.

77. Argentina has nevertheless laid stress upon them in another context. The Protocol of 1893, signed on May 1 of that year, was preceded by another instrument, dated 10 March, drawn up by the boundary commissioners who were to carry out the actual demarcation. This was entitled the "Act of the Experts" on which the Protocol itself was evidently based, there being virtually no differences of substance, and few of wording except that there are one or two clauses which the Protocol expands or elaborates. This "Act of the Experts" could in fact, in practice, have constituted the basis for the demarcation. But according to Argentina, what she regarded as being only an informal document

was not sufficient, or was inappropriate, for bringing about modifications in a Treaty that had been ratified by the National Congress of both Parties. Hence the "Act" of March became the "Protocol" of 1 May. Again the Court is at a loss to perceive the significance of this, seeing that the "modifications" in the Treaty resulting from both Act and Protocol were the same, and in neither case were such as to affect the character of the Treaty or to import into it an oceanic principle to any greater extent than was already evident in respect of particular localities in certain parts of the Treaty, and no further. One small difference between the "Act" and the Protocol calls for mention. At the start of the passage underlined* in the quotation given in paragraph 74 above, the Act reads "it being understood that by the provisions of this *covenant*", *i.e.* of the Act itself, instead of, as in the Protocol, "by the provisions of the said *Treaty*"—[stress added in both phrases]. The latter version is clearly more favourable to the Argentine thesis, but in the Court's opinion does not produce any real change in the resulting position.

78. It is possible that the Argentine contentions that have been under consideration above are really part of a more general theory to the effect that when a boundary Treaty provides for a demarcation on the ground it cannot (or the boundary definitions it contains cannot) be regarded as final and conclusive until the demarcation has been carried out. The Court will state elsewhere (see paragraph 169 (*b*) below) why it cannot agree with this view, at least in the form in which it has been put forward in the present case. But in any event it can have no application in respect of the attributions made in the Islands clause of the 1881 Treaty, since no demarcation was provided for in respect of these, or for the Beagle Channel itself.

(vi) *Conclusion regarding the Argentine attribution*

79. The Court can therefore only conclude from the aggregate of the considerations set out above that it has not been established that the PNL group was attributed to Argentina under the Islands clause of the Treaty. Accordingly, the Court will now turn to the question of whether the group falls within the Chilean attribution under that clause.

(vii) *The Chilean attribution under the "Islands clause"—Preliminary points*

". . . all the islands to the south of the Beagle Channel"

80. The Chilean attribution under the "Islands clause" reads "and to Chile shall belong all the islands to the South of the Beagle Channel [al Sur del Canal Beagle] as far as Cape Horn [hasta el Cabo de Hornos], and those there may be [que haya] to the west of [al Occidente de la] Tierra del Fuego". Since the islands of the PNL group, whether or not to the south of the Beagle Channel, are certainly not "to the west of Tierra del Fuego" (including or not including the archipelago), it is exclusively

* Italicized in this publication.

on their situation relative to the Beagle Channel that the question of their attribution to Chile depends. As has already been indicated, it is the fact that these islands lie between the two arms into which the Beagle Channel divides at its eastern end that gives rise to the problem of their relationship to the Channel, since either of these arms could, in the purely topographical sense, be regarded as the "true" continuation of the Channel eastwards to the open sea. Whether the islands lie "to the south of" the Channel depends therefore on which arm is deemed to provide the test of that. For reasons that will be stated in a moment, the Court does not think it possible to determine this matter on the basis of such differences as there may be between the physical characteristics of the two arms. The solution must be sought in the 1881 Treaty itself. But before coming to that, the Court will consider another possible aspect of the matter.

81. It is evident that the difficulty caused by the existence of the two arms could, in a certain sense, be at least avoided if the Channel proper, or as such, were regarded as stopping just before it divides at Picton Island or, if looking westwards, as only starting there, the two arms constituting simply entrances or exists, —and some colour is lent to this idea by the number of maps that show the words "Beagle Channel" placed so as to finish before Picton[39]. But suppose this were a legitimate process, it would ultimately solve nothing. It would by no means with absolute certainty take the islands outside all possibility of being regarded as coming within Chile's attribution (depending on the interpretation given to the expression "to the south of"), —but even if it did, they would not thereby necessarily become part of Argentina's, since all the difficulties attendant upon that, which have already been noticed, would remain. It might indeed be easier to view them as islands "on the Atlantic" (though again not as regards Picton), rather than as appurtenant to the Channel (see pararaph 65 (*f*) above), but they would still not be situated "to the east of" Tierra del Fuego or Patagonia, however these appellations were interpreted (see paragraphs 58 and 65 (*b*) above). The final result would thus be that the group would emerge not definitively attributed to either Party—a result that certainly could never have been intended.

82. But in any case, the Court does not believe there would be any warrant for the process of deeming the Channel to end (or only to start) just west of Picton Island, merely in order to take the PNL group out of it and avoid the problem created by its two eastern arms. At its western end also, the Channel, where divided by the presence of Isla Gordon,

[39] Included are some of the earliest—see Chilean Plate 1 (Fitzroy, Stokes and Murray) and Admiralty Chart 1373, 1st edn., 1841 (Chilean Plate 4). But there is an evident distinction between a toponymic and a course reference—and to insert an appellation in a waterway is not necessarily to indicate the whole extent of its course—see further, paragraph 90 below. It may be otherwise where a line is shown, either instead of, or additionally to the appellation, —see for instance the Nordenskjöld map of 1898, and a Belgian map of 1901 (Argentine Counter-Memorial Plates 36 and 41), both of which trace a line from Point X eastwards that stops short of Picton Island.

has two arms, respectively known as the *Brazo Nordoeste* and the *Brazo Sudoeste*. Both are regarded as being Beagle Channel. This configuration is repeated at the eastern end with, as the only real differences, that the eastern arms are somewhat broader and are divided by the presence of three islands instead of one.

83. The Court has also considered whether there is any ground upon which it could and should divide the group. Since its terms of reference require it to decide in accordance with international law, a division would have to be based on a difference of a juridical character between the situation of one of the islands as compared with that of the other two. The Court cannot find any such difference. Even if one of the islands can be regarded as being more evidently "on the Atlantic" than the others, this would not suffice of itself; all three islands must be either north or south of the Beagle Channel unless the latter were to be regarded (whether flowing north or south of Picton Island) as then passing between Nueva and Lennox Islands—as depicted for instance on the Argentine map of 1893 reproduced as Chilean Plate No. 63[40]. For this the Court can see no warrant either.

(viii) *The Chilean attribution—Geography of the two arms of the Beagle Channel*

84. Although without strict accuracy as a matter of the points of the compass, it will be convenient to call the two eastern arms the "northern" and the "southern" respectively—the one flowing between the Isla Grande and Picton and Nueva Islands; the other, between Picton and Lennox Islands on the east, and Navarino Island on the west. With regard to the physical characteristics of these two arms (apart from the different directions in which they proceed, as described earlier in paragraph 4), the Court notes the following resemblances and dissimilarities. Both are navigable, though the southern arm is the deeper off Picton Island. Both are used, —the choice depending—apart from weather and tides—on the direction of approach or destination; but in the days of sail, the southern was the more sheltered. In the case of both, one side is not continuous: in the northern arm there is a gap between Picton and Nueva Islands, and, in the southern, between Picton and Lennox. The former is a gap of some 8-9 miles (12.8 to 14.5 km.), the latter of some 6 miles (9.6 km.). The breadth of the northern arm varies from about 3.5 miles (5.6 km.) to some 7 or 8 miles (12.8 km. at most), —the southern arm is narrower, varying from about 2.5 to 6 miles (4 to 9.6 km.), and is more continuously narrow than the northern which broadens out considerably past the mid-point (Punta Nordeste) of Picton, whereas the southern arm, after broadening in much the same way when past Picton, narrows again abreast of Lennox Island.

85. The Court does not consider these differences as being more than differences of small degree, or as being in any way decisive in

[40] This map is one of those discussed hereafter in the section or cartography—see paragraph 157 (*d*).

themselves, in the sense of differentiating the two arms into waterways of distinct categories, one being a channel (or part of one), the other not. In particular, the criterion of breadth or narrowness is not *per se* a test of channel-like quality, as witness such cases as those cited in the footnote below[41]. In fact, in general, the world's narrowest waterways are called Straits rather than Channels. A strait has been defined as "A narrow stretch of sea connecting two extensive areas of sea", whereas the same source defines a channel as "*A relatively* [stress added] narrow stretch of sea between two land masses, and connecting two more extensive areas of sea"—(W. G. Moore, *A Dictionary of Geography*). The latter definition suggests that the length of the "land masses" bordering a channel, as compared with the very short extension of many straits, though by no means all, may be a relevant factor. But maps and terminology vary greatly, —the point is that no one of these elements is in itself determinant. Nor equally is the fact of a lack of continuity in one, or even both, shores of a channel, or of its being partly indistinguishable from open sea. A glance at the geography of the North Eastern and North Western Providence Channels in the Bahamas shows them to have, on both sides, only the most exiguous and discontinuous of coast-lines, —the English, St. George's, Sicilian and Malta Channels virtually consist of open sea,— and often it is not possible to say at what point a channel ceases to be such and becomes open sea. But it is certainly not possible to say it has so ceased, as long as, like both arms of the Beagle Channel, it has a continuous coast-line on one side, and island coasts on the other which, though non-continuous, are separated by only a few miles, and lie only a short distance from the *medium filum aquae*.

86. The conclusion the Court reaches therefore is, that from the point of view of what has to be decided for the purposes of the present dispute, there is only one difference of substance between the two arms of the Beagle Channel, namely that which arises from their different directions of travel. If the northern arm, which travels in a general west-east direction, though with a dip to the south east, is to be considered as being the Channel contemplated by the 1881 Treaty, then the PNL group lies to the south of it and comes within Chile's attribution. But if it is the "southern" arm, travelling in a general north-south direction that has to be so considered, then the group lies east of it, and does not fall within the ambit of the expression "to the south of the Beagle Channel". Accordingly, the Court will now consider which is the arm that has to be deemed to be the one contemplated by the Treaty.

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[41] For instance the northern Canada and Greenland Channels, named Robeson, Kennedy, Sverdrup, Peary and McClintock, varying between 30 and 70 miles (48-112 km.) wide; the Yucatan Channel (120 miles, 192 km.); the N.W. Providence (Bahamas) Channel—average breadth 40-80 miles (64-128 km.); the St. George's Channel (Ireland-Wales), 50-70 miles (80-112 km.); the English Channel (Manche) 80-100 miles—mostly more (128-160 km.); the Sicilian Channel (Cape Bon/Marsala or Cape Granikoia), 100 miles (160 km.); the Malta Channel, south of Sicily (60 miles, 96 km); and the Mozambique Channel, 300 miles (480 km.) at shortest distance over to Madagascar.

(ix) *Which arm of the Channel is the "Treaty" arm?*

87. *Difficulties of interpretation*—In endeavouring to carry out this task, the Court has found itself confronted by three major obstacles:

First, the Treaty itself furnishes no *express* indication at all as to what may have been thought of as being the course of the Beagle Channel: it simply says "to the south of the Beagle Channel" without definition or description of the Channel itself.

Yet, *secondly*, the Court has been unable to discover, in all the years of negotiation that preceded the conclusion of the Treaty, the least discussion as to what was the course of the Channel. Nor, for that matter, was this gone into for many years subsequent to the conclusion of the Treaty[42]. Since it has to be assumed that the negotiators were neither ignorant of, nor indifferent to, the geography of the region, it can only be supposed that they regarded the Channel's course as too evident to need discussion or definition. The Court considers this to be a legitimate, and also a highly significant deduction, to which it will return in due course.

Thirdly, the sole putatively reliable sources of outside information presumed to have been, at any rate known to, and available for the negotiators (whether in fact they made use of them or not), namely the statements, writings and maps of the early discoverers or explorers of the Beagle Channel, tend to be doubtful or conflicting, —and in the opinion of the Court they afford little certain guidance. These sources were extensively relied upon by both Parties, and both put forward highly plausible and (but for the contrary arguments of the other side) seemingly convincing reasons in support of the view that what the early discoverers and explorers of the Channel saw, or regarded as being its true course, was either the northern arm, or else the southern, as the case might be.

88. The truth seems to be that the descriptions given by the early explorers depended very much, as might be expected, on their direction of approach or destination, and the nature of the particular activity being conducted at the moment. Regarded as a whole, these descriptions, and their related maps and charts, are inconclusive; and this view is borne out, at least *prima facie*, by the reply dated 4 May 1896 given by the British Admiralty to an official Argentine enquiry as to the opinion of Captain R. Fitzroy, commander of the Beagle, and a chief actor in

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[42] This is strikingly borne out by the reports and interchanges concerning the Argentine-Chilean Boundary Commission, *circa* 1890—see Chilean Annexes 53-58. Even when the question of delimiting the "centre-line" of the Beagle Channel—*i.e.* of, in effect, attributing the "small islands within the Channel"—was under consideration in 1904, the matter of the two eastern arms does not seem to have been specifically brought in—see Chilean Annexes 69-71; and see, earlier, Annex 58 at p. 178 of the volume. But, as might be expected, the Director of the Chilean Boundary Demarcation Office in 1904, Señor Alejandro Bertrand, has in fact no doubt that the Channel flowed along the northern arm between Tierra del Fuego and Picton Island—see Chilean Annex 72, at p. 207.

these events. This (as given in Chilean Annex 365)[43] was to the effect that

> The Lords Commissioners [*i.e.* of the Admiralty] do not find that Captain Fitzroy ever strictly defined the course and limits of the Beagle Channel nor is there anything to show which of the arms passing by Picton Island he considered to be the principal one.

In this connexion it has also to be borne in mind that the early explorers were concerned with the Channel only in the geographic sense, and not as forming an element in a future (general and political) territorial settlement, of which they could know nothing.

89. *Some other sources of information*—In these circumstances the Court has sought for some independent investigation and assessment of the available evidence. Two such are afforded by (*a*) the long and carefully written Memorandum prepared in the Hydrographic Department of the British Admiralty, dated 28 December 1918, based on an earlier one of 6 July (reproduced in Chilean Annex No. 353); and (*b*)—expressing a rather different opinion—a statement by Sir Thomas Holdich[44] writing from the Royal Geographical Society, London, on 30 September 1918, to which the Admiralty Memorandum of December 1918 was, in some sort, a reply. Both these documents were drawn up at the request of the Foreign Office in London at a time when it seemed that the Beagle Channel question might be submitted to British arbitration. Both, together with related correspondence, are annexed hereto as part of Annex II. But because the Court will quote mainly from the Admiralty Memorandum, it also annexes, as Annex IIA, certain paragraphs from the Argentine written Reply in the case, as a balancing factor.

(*a*) The Admiralty Memorandum (No. 9 in Annex II) shows that subsequent to 1896 (see paragraph 88 above) the Admiralty investigated the matter further. It concentrated on the first and original (1830) expedition of the Beagle to the area, explaining that it was

> unnecessary to examine all the references to the Beagle Channel contained in the Narrative of the second expedition of 1831-1836; for such allusions are only inserted to make the narrative of events continuous, and no longer assist in giving a correct geographical definition of the waterway.
>
> The best proof of this assertion is contained in the fact that the descriptions of the Beagle Channel *in the Sailing Directions drawn up on the results of the first, and of the second, voyages, are identical* [stress added].

The Memorandum took the view that the Beagle Channel, at its eastern end, was constituted by its northern arm, flowing past Picton and Nueva

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[43] This reproduces the *draft* of a communication dated May 1896 from the British Foreign Office to the Argentine Minister in London: but a facsimile of the original letter dated 4 May from the Admiralty to the Foreign Office, in exactly the same terms, is amongst the documents in the possession of the Court.

[44] Colonel Sir Thomas Holdich, traveller and distinguished geographer and military engineer, had, together with Lord Macnaghten and General Sir John Ardagh, been one of the Arbitrators in the Argentine-Chilean arbitral proceedings of 1898-1902, concerning part of the Andean boundary.

Islands to a closing line drawn between Cape San Pío on the south shore of the Isla Grande and Punta Waller on Nueva Island (about 8 miles or 12.8 km.); and it accompanied this finding by a map the original of which can be consulted in the Public Record Office in London, showing the Channel, as thus defined, coloured blue. Two paragraphs in particular, occurring in the conclusions arrived at have been noted by the Court. The first reads:

> If the passage between Picton and Navarino Islands [*i.e.* the southern arm] be regarded as part of the Beagle Channel, that waterway no longer possesses the feature of straightness, so frequently alluded to by the first explorers.

This feature of the main stretch of the Channel between Isla Gordon in the west and Picton Island in the east can be seen on any map of the region. The second passage reads:

> The opinion of impartial geographers cannot be neglected, and the writers of the best known geographical works of the 19th and 20th centuries appear unanimous in regarding the eastern opening of the Beagle Channel in the manner described in the general conclusions of this memorandum.

The paragraph continues with an admission of certain errors in the relevant Admiralty publications, but in terms that can only strengthen the basic conclusion:

> It must be admitted, however, frankly, that, at the present moment, the Admiralty Charts and Sailing Directions have, in some respects, departed from *the definition originally given to the Beagle Channel by King and Fitzroy*[45] [stress added].
>
> It has been stated, however [earlier in the Memorandum], that these departures from the texts of the original authors *are not geographically admissible* ... [stress imparted].

And this was so even though it was acknowledged that the errors concerned were such as to "lend some colour to the arguments now advanced by the Argentine Government". Accordingly, the Admiralty stated that it would normally proceed to correct these errors (for errors it evidently considered them to be) "if no diplomatic questions were involved", but left that to the Foreign Office. As will be seen from the latter's letter to the Admiralty dated 14 January 1919 (*vide* No. 10 in Annex II), it was stated that the Foreign Secretary "would deprecate any change in the charts and sailing directions at the present moment".

(*b*) Although the doubts discussed in the latter part of the above-cited passages, and certain other queries considered in other parts of the Memorandum, in no way affected its basic conclusion (which was incidentally not newly arrived at—see paragraph 97 below), the Court, though believing the Memorandum to express an objective view, and to be of great value as information, prefers to regard it as inconclusive. It is for this reason that, as already indicated, the Court has reproduced as No. 5 in Annex II, the letter dated 30 September 1918, emanating from

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[45] There is some conflict between this statement and the Admiralty statement of May 1896—see paragraph 88 *supra*—but little useful purpose would be served by trying to resolve it. Its existence does however reinforce the view expressed at the end of sub-paragraph (*b*) *infra*.

the Royal Geographical Society, London, signed by Sir Thomas Holdich, as President, but undoubtedly also representing his personal views at the time[46]. As can be seen, the Admiralty disagreed with some of these views (see also No. 7 in Annex II), and it was in response to a request from the Foreign Office to comment on them that the Memorandum of the Department of the Hydrographer was prepared. In order, however, to illustrate the difficulties of the whole subject, it may be mentioned that twelve years earlier Sir Thomas had expressed himself in somewhat different terms. In his well-known work "The Countries of the Kings Award", published in 1904, he had shown, in a map[47] contained in or appended to it, a dividing line running north both of Picton and also of Nueva Islands. Asked two years later, at Chilean instance, in a private conversation, to confirm this, during an interview with the Chilean Minister in London (reported to the latter's Government in a despatch dated 9 January 1906[48]), he showed (according to that report) the greatest reluctance to commit himself, but nonetheless said at the end of the interview, in a passage that has about it the ring of truth:

> As you insist on knowing my opinion, I will tell you, but privately and provisionally, that in my view, and without forgetting that it is a controversial matter, the mouth of the Beagle Channel is the one indicated by the Chilean maps—[*i.e.* the northern arm, —as to these maps see the footnote below[49]].

Yet the different view he expressed in 1918 about Nueva Island was expressed quite as firmly. These hesitations and changes of mind coming from this highly regarded geographer and expert, conversant at first hand with Argentine-Chilean boundary questions, and familiar with the Beagle Channel region, indicate how unwise it would be to come to any definite conclusion as to the course of the Channel on any purely geographical basis, and confirm the conclusion already reached by the Court in that respect—see paragraph 86 above. They also confirm the lack of profit there would be in trying to choose between the varying accounts, given on various occasions by different explorers—or even by the same ones at different periods and in other circumstances.

(*c*) The Court has of course carefully considered the critical comments made by Argentina on the 1918 Admiralty Memorandum, and on some of the views of Sir Thomas Holdich. These comments are conveniently summarized in paragraphs 14-16 on pp. 287-91 of the Argentine written Reply and, as already mentioned, are reproduced as Annex IIA hereto. They do not seem to the Court to affect in any essential particular the conclusions it has reached about the views expressed in the documents, or on the occasions, described in sub-paragraphs (*a*) and (*b*) above: on the other hand, they do further illustrate the difficulty of reaching any finality on the geographical and historical aspects of the course of the Beagle Channel.

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[46] He then regarded Picton and Lennox Islands as Chilean, but Nueva as Argentine.

[47] This map figures in the documentation of the case as Chilean Plate No. 92.

[48] Text reproduced in Chilean Annex No. 527.

[49] There is reason to believe that there are no maps of Chilean origin that do not show the PNL group as Chilean, whereas a considerable number of Argentine maps show it, equally, as Chilean, not Argentine. The cartography of the case will be considered later.

90. *The data available to the negotiators*—As regards the negotiators of the Treaty themselves, it is impossible at this distance of time to know exactly what data they may have made use of. This can only be a matter of conjecture. However, if it could be shown that they did in fact base themselves on certain data that pointed only one way, *even though it was erroneous*, it might be possible to say that this was nevertheless the basis on which they negotiated the Treaty, and hence was what the Treaty must be deemed to mean. But this is not the case. An example is afforded by the only map which, so it seemed to be assumed, the negotiators must have taken account of *for Beagle Channel purposes*, namely British Admiralty Chart No. 1373, founded on those of the early explorers (Chilean Plates 1-4). The 1879—(*i.e.* Treaty- period)—edition of it is annexed hereto as Map C. This chart and its forebears, going back to the ancestor chart of Fitzroy referred to in footnote 50 below, and appearing frequently, in various editions and formats, in the cartography furnished by both sides, was much relied upon by Argentina as tending to show, by a process of negative inference, that the Channel, after the western point of Picton Island, proceeded by the southern arm. This inference was drawn from the fact that whereas the two *western* arms at Isla Gordon were duly designated as the north-west and south-west arms, the eastern arm north of Picton was designated "Moat Bay"—(it does contain a Moat Bay[50])—while the southern arm, in the section passing between Picton and Navarino, was given no appellation at all. The inference was therefore said to be that this unnamed section must have been regarded as being the true course of the Beagle Channel, an the other (called Moat Bay) not. The Court fully appreciates the point, but does not think it possible to draw any firm conclusion on such an ephemeral basis. The words "Beagle Channel" do appear on the chart, but are confined to the central section, west not only of Picton but even of Gable Island[51], —and it surely could never be claimed that because the lettering of these words does not reach beyond Gable, therefore the section Gable-Picton is not Beagle Channel. Again, to deduce that the negotiators must have

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[50] In the British Admiralty Memorandum of 28 December 1918 (*supra*, paragraph 89 (*a*)), the question of "Moat Bay" is commented on as follows, first on the basis of an earlier chart and then on that of chart 1373:

"The only document, which can be stated with certainty to express the ideas of, Fitzroy and of Stokes on the point at issue is the fair chart of the locality, drawn in 1831, at the conclusion of the first expedition [see Chilean Plate 1], and the attached tracing of the eastern mouth of the Beagle Channel has been taken from that source.

"An examination of the manner in which the name Moat Bay has been placed with respect to the neighbouring shore line and to the central line of the channel, leads to the conclusion that it was intended to designate as Moat Bay, the bend which occurs in the coast line between Cape San Pío and the Woodcock islands.

"This opinion is strengthened by an examination of the first edition of Admiralty Chart No. 1373, where the name, although brought more towards the centre of the channel, is still drawn on a curve which is nearly parallel to the shape of the bay.

"A less elaborate, but equally certain method of arriving at the same conclusion, is afforded by the reflection that Fitzroy can never have intended to give the name of Moat Bay to an open channel; and that the only feature in the locality corresponding to the accepted notion of a bay, is the one described."

[51] See paragraph 81 and n. 39 above.

regarded the section passing between Picton and Navarino as being the Channel merely because the chart did *not* say so, and the words "Moat Bay" are inscribed in the northern arm, appears to the Court to be far-fetched and too conjectural to be acceptable. The same type of criticism may be made of the deductions to be drawn from another of the early explorers' maps, Map 8 of the Argentine Memorial, a copy of the eastern half of which was circulated in the course of the hearings, —a map evidently much relied upon by Argentina. This shows the Channel from its western arms eastwards, as far as Picton, together with the eastern arm between Picton-Lennox and Navarino, but cuts off the entire northern arm except for a bare indication of it just north of Picton. Again, this map confines the words "Beagle Channel" to the central section west of Gable Island; —but from the fact that, at the eastern end, the Navarino arm was shown, while the northern arm was cut off by the edge of the map, the Court was asked to infer that the latter was not regarded as Beagle Channel, whereas the former was. It is not, however, from such tenuous indications that any firm conclusions can be drawn.

91. It has been seen that because the text of the Treaty furnished no direct definition of the course of the Beagle Channel at its eastern end, it was necessary to seek assistance from outside that text. This has been done, but without any really certain result, although it may be thought that the weight of the evidence (and see Annex II) tends to favour the northern arm. The Court therefore returns to the Treaty itself. If it contains no direct definition that would *per se* settle the matter, it may nevertheless provide material from which sufficiently firm conclusions can be reached as to whether the PNL group falls within the Chilean attribution or not.

(x) *Factors pointing to the northern arm as being the "Treaty" arm*

92. *First*, if a process of simple elimination is employed, it will be found to place the group within the Chilean attribution and, in so doing, will also settle what the course of the Beagle Channel must be deemed to be for the purposes of the Treaty. Since it has to be presumed, *prima facie* at least, that the Treaty must be interpreted in such a way as to bring about a complete allocation of all the territories and islands in dispute between the Parties at the time of its conclusion, —and if at the same time it appears that, as has been seen, the PNL group cannot, or cannot with sufficient certainty, be regarded as being part of Argentina's attribution (*supra*, paragraph 79), then the islands of the group must be placed within the Chilean allocation, provided of course that some clause of that allocation is capable of covering them. They cannot by any stretch of imagination be brought within the clause specifying all islands "to the west of Tierra del Fuego", but they can fall within the terms of the clause "to the south of the Beagle Channel" if the northern arm past Picton to Cape San Pío and Nueva Island is taken to have been intended for the purposes of the Treaty; —and a total failure of the Treaty in respect of the PNL group being the only alternative on the

basis of these premisses, and being one that was to be excluded, such an intention can legitimately be presumed.

93. *Next*, there are the very terms of the Chilean attribution. The expression "to the south of" can only imply a direction in relation to which the terms "south", and "north", are significant, —in other words, an east-west, west-east direction which, broadly, is that of the northern arm of the Beagle Channel along the southern shore of the Isla Grande, past Cape San Pío to the sea. But all significance and applicability of the term "south of" is lost in relation to a waterway the general direction of which is already from north to south, so that any islands in the vicinity would normally be indicated as being east or west of it, not north, or south. Up to Picton Island, the Beagle Channel runs indubitably west-east, so that any islands not situated in the Channel itself must be north or south of it. But the same criterion of a north or south localization (as postulated by the wording of the Chilean attribution) can only be preserved for the rest of the Channel, past Picton, if it is deemed to continue to go in an easterly direction by the northern arm, not a southerly one by the other arm. The Court thinks that the negotiators of the Treaty, in specifying a "to the south of" criterion, cannot possibly have contemplated a Channel which, over an important stretch of its course, would depart from the direction in respect of which that criterion was relevant and efficacious, suddenly to assume one that ended by pointing almost the opposite way, —for at the end of Lennox Island, the southern arm adumbrates a turn to the south-west, away altogether from the general course of the Channel, and virtually starts to go back westwards, except of course that, *qua* Channel, it stops there.

94. *Finally* and principally, the Court has considered why it was that the negotiators of the Treaty, having carefully defined all the other boundaries concerned—the north-south boundary down the Andes (Article I), the east-west Dungeness-Andes line (Article II), the north-south Cape Espíritu Santo/Beagle Channel line (first part of Article III)—failed to define any boundary when they came to the west-east Beagle Channel line, and treated the Channel, in effect, as if it were a river line that needed only naming, but not describing as to its direction and flow. The Court thinks that this can be accounted for in one way only, just as there can only be one rational explanation of the fact (see paragraph 87 above) that in the whole record of the negotiations the course of the Channel seems never once to have been discussed. This must have been because the course of the Channel appeared to the negotiators to be so obvious as not to need definition or even discussion. But there was only one basis on which this could have been the case, —and here the Court refers to what it has stated in paragraph 50 above concerning the consequences of the drawing of the perpendicular line in the Isla Grande from Cape Espíritu Santo to Point X near Lapataia on the Beagle Channel, *without any further definition of the part of the Isla Grande thereby attributed to Argentina* except to say that the Isla, "divided in this manner", and Chilean on the western side, would be "Argentine on the eastern". As described in the paragraph just referred to, this

automatically had the effect of making the south shore of the Isla Grande, from Cape Buen Suceso near Staten Island, back westwards to Point X on the Beagle Channel (with the appurtenant waters), the southern limit of Argentina's allocation under the Treaty, except of course as regards any islands south of that limit that might be attributed to her under the Islands clause of Article III.

95. Another way of arriving at the same conclusion is to consider what was the base line with reference to which the perpendicular from Cape Espíritu Santo was drawn. It cannot have been the Beagle Channel as such, for it was the *whole* Isla Grande that was being divided, and its southern shore runs along, but extends beyond the Channel, at both its eastern and its western ends. It was this entire southern shore (which comprises, but is not co-terminous with, the north shore of the Beagle Channel) that was the base line, the Channel being mentioned because it was the most prominent feature of the locality, and the terminal to which the Isla Grande perpendicular descended at its southern end. The inevitable effect of this, however, was that the boundary line of the south shore of the Isla Grande not only encompassed the Beagle Channel from Point X eastwards, but coincided absolutely with the north shore of the Channel, *and with the north shore of the northern arm of the Channel*, up to the latter's terminating point at Cape San Pío or possibly Punta Jesse. Or to take the approach from the Staten Island direction, the south shore of the Isla proceeded westwards until the vicinity of these Capes, after which it started to coincide with and automatically became, not only the north shore of the Beagle Channel as far as Point X, but to do so *via*, as the connecting link, the northern arm of the Channel.

96. Given this situation, the Court thinks it almost mandatory, or at least a matter of compelling probability, to conclude that in the circumstances, the negotiators of the Treaty could only have seen the Beagle Channel as continuing past Picton by its northern arm, and to consider it as scarcely conceivable that, without comment, they can have intended a Channel that would turn away from the south shore of the Isla Grande at Picton Island, and proceed in quite a different direction, pointing ultimately towards Cape Horn. That such a direction might assist the Argentine view about the "fringe" islands lying between the PNL group and Cape Horn is not relevant in the immediate context.

97. The foregoing conclusion is re-inforced in certain incidental ways connected with sailings: —

(i) The evidence supplied by Counsel for both Parties during the oral proceedings, indicates that in the period from 1848 to 1901, *i.e.* in the periods prior to and after the framing of the Treaty, the passage north of Nueva (the northern arm) was the customary track of vessels in voyages going to and from Staten Island, or the Malvinas (Falkland Islands) or Buenos Aires, and various destinations in the Channel, principally Ushuaia, Woollya and Harberton. Furthermore, the prepon-

derant flow of traffic was to and from localities on the eastern seaboard of the Atlantic, rather than from or towards the south—(for further details see Annex III hereto). The almost invariable use of this northern outlet to the ocean was, of course, not surprising, since the inference is that it must have presented itself to mariners as the most accessible and direct route. The customary use of this entrance or exit would have resulted in its being regarded as the main arm of the Channel by those concerned with it, as were the negotiators of the 1881 Treaty; —and since a point somewhat insisted upon by the Argentine side was the alleged danger to navigation entailed—at least in the days of sail—by the stronger adverse winds and currents said to be a feature of this northern arm, the Court has noted the following remarks in an earlier British Admiralty memorandum of 26 August 1915[52] (Chilean Annex No. 104) that preceded, but expressed the same basic view as that of 28 December 1918 already considered (*supra*, paragraph 89 (*a*)). These remarks were to the effect that the southern arm has been "much less surveyed and charted" than the northern one, and appeared to be "*distinctly more dangerous and less convenient*" than the one "flowing to the North"—stress added.

(ii) The Italian navigator Giacomo Bove, in the first of two reports rendered to the Argentine Government in 1882 concerning his sea-voyages in the Magellanic and Beagle regions, and writing from Slogget Bay on the south coast of Isla Grande near Punta Jesse, and north of Nueva Island—(therefore close to the eastern extremity of the northern arm of the Beagle Channel—see Maps)—duly described this Bay (Sloggett) as situated "at the end of the Beagle Channel and a little to the east of Nueva Island"—(Chilean Annex No. 353, at p. 98).

(iii) The Argentine Governor of Tierra del Fuego, in his official report on the sea-voyages he made in 1855, as mentioned in paragraph 5 (*a*) of Annex III hereto—one of which took him along the northern arm of the Channel—stated (Chilean Annex No. 49, at p. 155) that he "spent the night at Banner Cove, *a Chilean port* (stress added), —Banner Cove being on Picton Island in the northern arm of the Channel.

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[52] This memorandum was not prepared in the Hydrographic Department of the Admiralty but in that of the Director of Naval Intelligence. It figures as Chilean Annex 104, and well repays study in its entirety. It tended to favour Chile, though without reaching any really hard and fast conclusion; and the Hydrographer, Admiral Parry (over whose signature the later, 1918, memorandum appeared) commented (Chilean Annex 104 at p. 276):

"It appears possible that further investigation might . . . furnish other evidence in this matter, but at such a time as the present [it was war-time] it is obviously impossible that complete justice can be done in such an important and interesting question."

See further, No. 1 in Annex II.

(iv) In the same report the Governor, in recommending the future territorial sub-division of the governorate of Argentine Tierra del Fuego, did so in terms which to the Court appear by clear inference to identify the course of the Beagle Channel with the Channel's northern, not southern arm, and with the south shore of the Isla Grande—see paragraphs 94 and 95 *supra*—(Chilean Annexes, *loc. cit.*, at p. 158).

98. *Consideration of possible objections*—Various objections have been made to the above conclusion about the course of the Channel:—

(*a*) *The first* of these can be disposed of very quickly: the "costa seca" or "estéril" objection, —a dry and sterile shore without waters would not be a possible boundary. But of course there would be waters, —the waters that, according to the generally received rules of international maritime law, are regarded as automatically appurtenant to territory—a fact recognized by the Argentine negotiator, Señor Irigoyen, himself[53]. The Court has already dealt with this matter in another context in paragraph 6 above—(and see also, below, the section on the islands within the Beagle Channel itself). There may, of course, in given cases, be controversy as to how these rules are to be applied. Nevertheless, in principle, they provide the means of determining the matter.

(*b*) *Next*, it was objected that the conclusion reached above (in paragraph 94) involved a gratuitous and unwarranted substitution for the boundary contemplated by the Treaty (said to be the Beagle Channel) of a different boundary, the Isla Grande shore. But this objection is completely fallacious. The Islands clause of the Treaty did not indicate the Beagle Channel, as such, as a boundary, but merely as a reference line for the attribution of the islands lying to the south of it. Indeed, the negotiators seem to have deliberately avoided drawing any boundary line in, or along the Channel, even for the purpose of determining the title to the islands within it. The Channel was mentioned for quite other reasons, —namely to specify where the north-south perpendicular from Cape Espíritu Santo was to stop, —and secondly, as a means of identifying certain of the islands attributed to Chile. The notion of the Channel as a boundary must have come about largely because of the contingency that what the Court thinks is the real boundary, namely the Isla Grande shore and its appurtenant waters, happens to coincide over about half of its length in the section Buen Suceso to Point X, with such a prominent geographical feature as is constituted by the Channel. But it is with the northern shore and northern arm that it so coincides. The course of the Channel for the purposes of the Treaty being thus evident, no doubt the Channel itself—not originally seen as a "boundary"—

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[53] Speaking, actually, of the Straits of Magellan (but the principle is the same), he said in his speech which is the subject of paragraphs 113ff. below, at p. 122 (see explanation of this reference in n. 60 *infra*):

"In the case of jurisdiction, the waters cannot be separed from the coasts . . . Least of all in the case of a Strait . . . jurisdiction cannot be exercised over the coasts by someone with no jurisdiction over the waters which wash them."

became regarded as such, —but that is another matter: it cannot change the fact that, in contrast to what the negotiators did under the other territorial provisions of the Treaty, which necessitated the definition or drawing of boundaries that were artificial or not self-evident, these same negotiators, in this region, drew no lines and specified no boundaries because, as the Court sees it, these were not required. The boundaries of Argentina's Isla Grande attribution, —namely the perpendicular, the Atlantic coast-line, and the line of the south shore to Point X, were self-evident. The rest was done by specific attributions. The Beagle Channel, seen by the negotiators—for the reasons already explained—as proceeding by way of the northern arm to Cape San Pío, left the PNL group to the south of it, and therefore within Chile's attribution.

(*c*) *Finally*, it may be asked why, if the conclusion just reached is correct, the Chilean attribution did not simply take the form of specifying "all the islands to the south of the Isla Grande (or of Tierra del Fuego)"[54] instead of "to the south of the Beagle Channel". The answer clearly is that this was not done because, unless qualified in some detail, it would have resulted in the attribution to Chile not merely of the islands south of the Channel but of the whole Channel itself, east as well as west of Point X, and everything in it. This was what had been done in the case of the Straits of Magellan, but only on the basis that Chile would have the shores and hinterland on both sides of the Straits. In the case of the Beagle Channel, Chile was only intended to have the south shore, with appurtenant waters, in the section between Point X and Cape San Pío or Punta Jesse, Argentina having the north shore, with appurtenant waters. The Court will consider separately, later, the question of the islands lying within the Channel—a question not in terms dealt with by the Treaty.

(xi) *Conclusion on the Chilean attribution south of the Beagle Channel*

99. Therefore, none of the above-mentioned objections appearing to be valid, the Court must hold the islands of Picton, Nueva and Lennox to be situated "to the south of the Beagle Channel", as that expression is to be understood for the purpose of the Treaty. This view is strongly supported by later confirmatory material, to which the Court will come in due course.

(xii) *The western islands*

"... and those [islands] there may be to the west of Tierra del Fuego"

100. The western part of Chile's attribution is not relevant to the question of the PNL group, or of the other islands within the "Hammer",

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[54] Such a version of the Islands clause actually appeared in 1889 in a work in French, and was depicted on an accompanying map. This work was sponsored by the Argentine authorities for the purpose of the Paris World Exhibition of that year—see further, paragraph 157 (*b*) below. However, the suggestion intended to be conveyed was the opposite one, namely that the PNL group fell within the Argentine attribution under the Treaty, because south of Tierra del Fuego and "on the Atlantic".

since on no possible basis could they be regarded as lying "to the west of Tierra del Fuego". But, as was indicated earlier, in paragraph 63, it is necessary to consider the wording of this attribution because of the potential repercussions that it might have on the analogous expression "to the east of Tierra del Fuego" in Argentina's attribution under the Islands clause. The point involved has been sufficiently stated in the paragraph just referred to, —but briefly, the Argentine contention is to the effect that if the words "to the west of Tierra del Fuego" are interpreted in the same way as Chile contends that Argentina's attribution of islands "to the east of Tierra del Fuego" ought to be interpreted (and unless they are interpreted in the sense that Argentina contends should be given to her own attribution), it will be found that a number of western islands, presumed to be Chilean, are not allocated at all under the Treaty because, although they may be west of the archipelago, they are not west of the Isla Grande, —or else because, being part of the archipelago, they cannot lie "to the west" of it, although they may be on its western fringe[55]. Certain other islands[56], which otherwise might espace these objections by reason of being in any event "to the south of the Beagle Channel", are said not to be so because they are only south of the north-west, not of the south-west, arm of the Channel at its western end.

101. With regard to the latter group of western islands, the Court thinks that the Argentine contention is in any case misconceived because the two western arms of the Channel have always had equal status as being "Beagle Channel", and it suffices (for the test of being south of it) that an island is south of either arm. With regard to the other islands (see note 55), said to be unallocated on the basis of this Argentine contention, it seems that the possibility has been overlooked—(a possibility which the Court thinks probably represents the truth)—that these islands were already so admittedly Chilean, and regarded as such by both sides, that they were not intended to be covered by the Treaty settlement at all, because not considered to be part of the "controversia de límites" to which its Preamble refers. The point is graphically portrayed through the medium of a map—see *infra*, paragraph 122—that will also be referred to later for its value as confirming the Court's view concerning the course of the Beagle Channel in the vicinity of the PNL group. It will be convenient to call this map the "Irigoyen" map (Chilean Plate 21) because it was given or sent to the British Minister in Buenos Aires by Señor Irigoyen, the Argentine Foreign Minister and chief Argentine architect of the 1881 Treaty, shortly after its conclusion, in order to illustrate the nature of the settlement. The map does not (in general) do this by indicating boundary lines, but by differential colouring of the territories respectively attributed to Argentina or to Chile. At the same time it shows in white (uncoloured) those territories (that is to say the Argentine territories north of the Río Negro, and the Chilean territories

[55] In particular the islands of Clarence, Santa Inés, Ricetrebor, Jacques and Desolación.

[56] In particular those of Stewart, O'Brien, Londonderry and Gordon.

along the trans-Andean Pacific coast and in the Magellanic and Islands region) that did not come into the Treaty settlement at all, because they were not then the subject of any disputed claim. Amongst those thus shown in white are, precisely, those that the Argentine contention now under discussion would place in the category of being unallocated. Amongst the "Aclaraciones" (clarifications) printed on this map, there appears the following:

> El Archipiélago al Occidente de la Tierra del Fuego (que aparece sin colores) ha sido siempre del dominio incuestionable de Chile.
>
> The Archipelago west of Tierra del Fuego (that appears uncoloured) has always been under the unquestionable sovereignty of Chile.

In confirmation of this, the Court noted statements made on behalf of Argentina in the course of the oral hearings to the effect that, with reference to the proposal for arbitration put forward from the Argentine side as an alternative to the 1881 Treaty, should be the latter fail (see paragraph 66 (2) (*c*) above), it was the intention to recognize *a priori*, and as not coming within the scope of the arbitration, all Chilean claims west of meridian 70°. This however covered precisely the islands which it was subsequently alleged would remain unallocated under the Treaty unless the Argentine interpretation of what was attributed to it under the Islands clause was accepted[57].

102. The Court can only conclude therefore that no sufficient reason has been shown in this respect why it should not adhere to the views it has already expressed as to the effect of the Argentine attribution.

(6) *The small islands within the Channel*

103. Within the Beagle Channel, and in the vicinity of the PNL group, there are a number of small islands, islets, rocks, banks, etc., which it will be convenient to refer to globally as "the small islands in the Channel". As they are all within the area of the "Hammer" (*supra*, paragraph 1), it is part of the task of the Court to declare what their ownership is. This task is assigned to the Court by both the respective Requests of the Parties (*supra*, paragraph 2), —directly in that of Chile, and by implication in that of Argentina which asks for a determination of "the boundary line between the respective maritime jurisdictions" of the Parties. Equally, Article XII of the *Compromiso* bids the Court to include in its decision "the drawing of the boundary line on a chart". This is formally a distinct exercise from the attribution of the small islands concerned but, as explained earlier in another context (see paragraphs 6 and 53) it seems to the Court to make little practical difference whether the line results from the attributions, or the attributions from the line, provided the principles involved are clear.

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[57] There are also several passages in Señor Irigoyen's speech referred to in n. 53 above that explicitly admit the absence of any Argentine claim to Chilean territory west of the Andes or at the western end of the Magellanic region—see for instance the last quotation in paragraph 114 (v) below, and see paragraph 116.

104. No difficulty arises over the islands immediately adjacent to the PNL group, the ownership of which follows that of the latter, in accordance with the conclusion already arrived at in paragraph 99 above. There is also no difficulty about the small islands lying in the southern arm of the Beagle Channel, between Navarino Island and the islands of Picton and Lennox since, in conformity with the same conclusion, this arm is wholly Chilean. The problem is therefore confined to the section of the Channel running from Point X near Lapataia to Picton Island, and thence along the northern arm, between the Isla Grande and Picton and Nueva as far as the eastern limit of the "Hammer"—a limit represented by a line running due south from a point just west of Punta Jesse on the Isla Grande, and passing Nueva Island about a quarter of a mile to seaward of its easternmost extremity— (this line is in fact that of meridian 66°25′). It is in respect of this section of the Beagle Channel, from Point X to the "Hammer" limit between the Isla Grande and Nueva, that the Court has drawn the red boundary line on the chart that accompanies the present decision entitled "Boundary-Line Chart".

105. The effect of this line, which represents the Court's decision as to the boundary between the respective territorial and maritime jurisdictions of the Parties, is to attribute to Argentina all the islands and other formations within the area of the "Hammer" lying to the north or (at its eastern end) north-east of the line, and to Chile all those to the south or south-west. But before stating the principles on the basis of which the line has been drawn, the Court must explain how the attributions that result from it in respect of the small islands in the Channel fit into the general structure of the Treaty of 1881.

106. The small islands do not fall within any of the specific attributions made under the Islands clause of Article III of the Treaty: they are neither to the east nor to the west of either Tierra del Fuego or the archipelago, and being in the Beagle Channel itself cannot lie to the south of it. Having regard to this, Chile put forward a scheme of allocation based on a principle of appurtenance derived from the Treaty, to which the Court will come in a moment. But first it will be convenient to consider an alternative view advanced by Chile, which was to the effect that, failing everything else, all of the small islands in the Channel must be deemed to have been attributed to her by virtue of the global effect of Article II, which (as she contends) allocates her all territory south of the Dungeness-Andes line subject only to the effect of Article III (see paragraph 32 *supra*). Hence, since these islands are not attributed at all by Article III, they are automatically Chilean. Argentina rejects this view on the ground that, as already described (paragraph 33 *supra*), Article II does not have the effect contended for by Chile, and only allocates her the territories lying between the Dungeness-Andes line and the Straits of Magellan, but nothing south of the Straits.

107. Irrespective of which of these views about the effect of Article II is correct—a question on which it has not thus far been necessary to reach any definite conclusion (*supra*, paragraph 49, but see now paragraph 110 below)—the Court regards the Chilean view as unaccept-

able in the context of the small islands situated within the Beagle Channel itself, —because applied in that context it would have the effect of allocating to Chile not only these islands, but the Channel as such, and all its waters. This would be incompatible with the specific attribution to Argentina, under the first part of Article III of the Treaty, of the whole north shore of the Channel from Cape San Pío to Point X, as part of the south shore of the eastern half of the Isla Grande that went to Argentina according to that provision; —for the Court considers it as amounting to an overriding general principle of law that, in the absence of express provision to the contrary, an attribution of territory must *ipso facto* carry with it the waters appurtenant to the territory attributed; and therefore, on the Channel, those extending up to some sort of median line—see paragraph 98 (*a*) above. This principle could not be regarded as negatived by a simple general attribution of all territory south of a given line such as, according to Chile's contention, resulted in principle for her from Article II of the Treaty; —and in any case that attribution was itself, by reason of the "without prejudice" clause it contains (see *supra*, paragraphs 15 and 32), made subject to Argentina's allocation under Article III of the eastern half of the Isla Grande, an allocation which the Court holds must include the appurtenant waters. But a division of the waters of the Channel along a boundary line must necessarily entail—subject to certain adjustments to be explained later—a corresponding division of the small islands lying in it, depending on which side of the line they are situated.

108. Since it was only as an alternative that Chile put forward the argument just considered, it need not be further discussed. Her principal view regarding the islands in the Channel was that although the Treaty of 1881 did not in terms attribute them, it provided a principle of attribution on the basis of which they could, by implication or analogy, be allocated. This the Treaty did by instituting a north-south test of attribution in relation to the Beagle Channel, the north shore from Point X to Cape San Pío or Punta Jesse being Argentine, the south shore (Islas Hoste, Navarino, etc.) Chilean. An obvious principle of appurtenance required that accessory and minor formations not specifically allocated, should be deemed so to have been by implication, together with the larger pieces of territory to which they were immediately appurtenant. Combined with this, however, was a criterion of the main waterway, which has nothing to do with appurtenance as such, but may provide a basis of selection in the case of islands in midstream. Chile accordingly furnished the Court with a list of the islands which, in her view should, on these premisses, be regarded as Chilean: the rest would be Argentinean. Argentina, for her part, furnished a map tracing a line in mid-Channel as far as the vicinity of Picton Island. This line was, in principle, a median line, but deviated somewhat from the true median in certain places.

109. As was conceded during the oral hearing (and see also paragraph 53, *supra*), little practical difference would result from these two methods as regards the islands that would become attributed, or would be left to each side respectively, in the section of the Channel between

Point X and the vicinity of Picton Island. Thereafter, the results are bound to differ, since according to Argentina, the whole northern arm, and the islands in it, should be hers, and also the eastern half of the southern arm, —whereas, according to Chile, only half the length of the northern arm (along the Isla Grande coast), split horizontally, would be Argentine, while the whole southern arm would be Chilean. Apart from the effects of this difference of view (now resolved in the light of the Court's findings in favour of the northern arm as being the "Treaty-arm"), the only other difference of substance was in respect of the Islas Bécasses (Woodcock Islands) which are situated in mid (northern) Channel, between the Isla Grande shore and the extreme western point of Picton (Punta Ganado or Point Gilbert). Despite the fact that this little group, if not by much, is still definitely somewhat nearer the Isla Grande shore than that of Picton Island, it was yet claimed by Chile, on the ground that the main waterway normally used by shipping ran between the group and the Isla Grande shore. The Court shares the Chilean view about the applicability in general of the principle of appurtenance, but for that very reason thinks that the Bécasses group should be allocated to Argentina, the "main waterway" criterion not being compelling enough—at least in this locality—to justify any derogation.

110. In drawing its own line on the attached Boundary-Line Chart, as described in paragraphs 104 and 105 above, the Court has been guided by the considerations indicated in Annex IV hereto (which shows how the line has been traced), —in particular by mixed factors of appurtenance, coastal configuration, equidistance, and also of convenience, navigability, and the desirability of enabling each Party so far as possible to navigate in its own waters. None of this has resulted in much deviation from the strict median line except, for obvious reasons, near Gable Island where the habitually used navigable track has been followed.

(7) *The unresolved question of the Chilean allocation under Article II of the 1881 Treaty*

111. It will be recollected (see paragraph 49) that the Court left unresolved the question whether the Chilean allocation under Article II of the Treaty extended in principle to all territories south of the Dungeness-Andes line (subject only to the effect of the "without prejudice" clause), or was confined to the area between that line and the northern and western shores of the Straits of Magellan, —see generally paragraph 32 *et seq.*, above. That question had no direct relevance to the interpretation either of the Argentine or the Chilean attribution under the Islands clause of Article III, but could become material in any one of three ways; —(*a*) if it had proved to be the case that on the basis of the Islands clause standing alone, the PNL group would remain unallocated to either Party; (*b*) if, having regard to the way the Court has interpreted the expressions "to the east of" and "to the west of", in the Islands clause, certain western islands would have proved not to have been directly allocated, and this would have had repercussions on the question of the interpretation to be given to the Argentine attribution under

that clause—(for the explanation of this, see paragraphs 63 and 100 above); and (*c*) if the Treaty had afforded no adequate guidance as to the principles on which the small islands within the Beagle Channel should be allocated (see paragraph 106). In any of these eventualities it would have been Chile's contention that under the global, residuary, or "catch-all" effect of her allocation under Article II, everything south of the Dungeness-Andes line must fall to her (other than what was attributed to Argentina or denied to Chile by Article III). In that case it would have been necessary for the Court to reach a positive conclusion on the question of the extent of the Chilean allocation under Article II. Recourse to that Article is however unnecessary, since it is clear that independently of it, the PNL group, and the small islands within the Channel, can be attributed under the Islands clause of Article III, and that the question of the western islands can be disposed of in the manner specified in paragraph 101 above. Hence the Court thinks that, for the purposes of the present dispute, there is no need for it to decide this question, the various aspects of which have been fully discussed in their appropriate context.

IV. *Confirmatory or Corroborative Incidents and Material*

112. The conclusions reached above find confirmation or corroboration, directly or indirectly, in a number of ways, some of which have more appropriately received mention earlier—see for instance paragraphs 73, 76, 89, 97, and footnote 42 *supra*. There are various others, and without attempting any logical classification of these, the Court will deal according to convenience with the various matters involved, confining itself to those that appear to be specially significant or noteworthy, and stressing that its substantive conclusions are not based upon them.

1. *The immediate post-Treaty period*

(*a*) *Argentine acts*

(i) *Señor Irigoyen's speech of August/September 1881*

113. Between five and six weeks after the signature of the 1881 Treaty, Señor Irigoyen, the Argentine Foreign Minister and principal negotiator on the Argentine side, made a speech in the National Chamber of Deputies, continuing over three days from 31 August–2 September, partly in presentation and explanation of the Treaty, partly in defence of certain of its aspects. This speech has been greatly relied upon by Argentina in support of the view that she had obtained, or retained, under the Treaty, all the Atlantic islands down to Cape Horn, —or at least that such was the belief of this distinguished statesman who, as one of the chief architects of the Treaty, could be assumed to be in a position to know. A careful study of the speech does not, however, bear out the interpretation Argentina has placed upon it.

114. *The Atlantic coasts and Cape Horn*—The speech is in fact mainly—indeed to quite a striking extent—devoted to the question of

the Straits of Magellan and the Magellanic region, —to a lesser, but still considerable extent, to that of Patagonia north of the Dungeness-Andes line, —and only moderately to Tierra del Fuego, and then chiefly in the sense of the Isla Grande: but there is hardly a word about the islands as such, beyond what may indirectly be implied from one or two references to the Altantic coasts and Cape Horn such as that which has already been quoted in paragraph 66 (3) above, to which the Court cannot attach any decisive value for the reasons there given. Other considerations endorse this view:

(i) There is reason to think that the appellation "Cape Horn" was often used figuratively as a convenient means of reference, —and rhetorically in such expressions as "hasta el Cabo de Hornos" ("as far as Cape Horn"), —in order to convey the idea of contingent claims, or assertions of title, extending in a general southerly direction, to which, however, no precision was given, and which therefore cannot be regarded as juridically meaningful: pointers rather than designations. This comes out particularly strongly in such passages as that quoted in sub-paragraph (iii) below.

(ii) It is however most apparent in the context of Staten Island, where the reference to Cape Horn was, so it has been suggested, used as "a sorthand form" for identifyng the extent of the Argentine main Atlantic coastal claim, down the eastern shore of the Isla Grande of Tierra del Fuego, to and including Staten Island as a sort of limit. The tendency to regard Staten Island as a terminal can be seen more especially in the passage quoted in sub-paragraph (iv) below. This tendency, and the way in which such references to Cape Horn lack any precise application, is apparent in, for instance, the Argentine Law No. 269 of 6 October 1868, granting to one Luis Piedra Buena, as a reward for his pioneering activities, the ownership of the Isla de los Estados (Staten Island) "situada sobre el Cabo de Hornos" (situated on Cape Horn),[58] which can scarcely be said of Staten Island (see next sub-paragraph) though it is in the same general region.

(iii) The same figurative use of the Cape Horn appellation was made by Señor Irigoyen himself in a Note to the Chilean Minister in Buenos Aires, dated 30 May 1877 (*i.e.* in the very period of the negotiations for the 1881 Treaty), in which he similarly said that he wished "to recall the 1868 concession of the Isla de los Estados, situated 'sobre el Cabo de Hornos', that is to say in the southernmost part of this Continent, to Captain Luis Pedra Buena"[59]. It may not be entirely without significance that the Argentine translation of this passage gives it as "situated *towards* Cape Horn"—(stress added), but

[58] Annex 36 to the Argentine Reply.
[59] Annex 10 to the Argentine Counter-Memorial, p. 57.

according to Chile the Spanish original says "sobre"—on. Moreover, even if Spanish usage enables "sobre" to be rendered as "towards", this would still constitute a figurative use of the notion of Cape Horn, 120 miles (192 km.) distant (south-west) from Staten Island, and hardly in the same direction except that it is in the far south of the continent. Further confirmation of this representational use of the term "Cape Horn" is to be found in a passage in Señor Irigoyen's speech[60], in which he went so far as to place that term within quotation-marks:

> ... I did not wish to conceal the possibility that national jurisdiction might be interrupted over any part of the extensive coast stretching as far as "Cape Horn".

This passage is of course significant in another way also, but in any case there is no "coast" as a continuous line stretching as far as Cape Horn, which is on an island in the Wollaston group—a group separated by varying stretches of sea from its neighbours.

(iv) A clue to the real character of Argentine thinking at this time in regard to the extension southward of the "Atlantic" claim, is to be found in a Note of 30 June 1875 from the then Argentine Foreign Minister to the Chilean Minister in Buenos Aires, in which the following passage occurs (it is quoted in full to bring out the significance of the relevant part occurring at the end)[61]:

> The discussion on boundaries in 1872 was opened by a solemn undertaking by the Government of Chile not to hinder Argentine jurisdiction over the Atlantic coasts. It is to be noted that Chile undertook this obligation after the acts of possession of these coasts were carried out pursuant to the laws enacted by the Argentine congress between 1868 and 1871, by virtue of which jurisdiction was extended *to the extreme end of the Continent, that is, to the island of Estados*—[stress added].

(v) The absence of any references to the islands as such in Señor Irigoyen's speech, except for a bare recital—not even of the Islands clause of the Treaty—but of the *Base Tercera* of 1876 (*supra*, paragraph 25), and without comment or discussion—is rendered all the more striking by the fact that there are several places where a specific allusion to the southern islands was to be expected if these were really claimed, or were regarded as being within Argentina's attribution under the Treaty. For instance, at one point,[62] the Minister tells the Chamber—referring to the line of the 52nd parallel (part of the Dungeness-Andes line)—that

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[60] Speech, p. 103—the reference is to the typed copy of the English translation made available by Argentina in the course of the oral hearing, and the only complete one in the documentation of the case.

[61] Chilean Annex 17, at p. 32.

[62] Speech, pp. 91-92.

> we still hold to the South of this line part of the Territories of Tierra del Fuego [meaning here the Isla Grande],[63] Isla de los Estados and the area between the said line, the Strait [of Magellan] and the foothills of Monte Aymond [north of the Strait].

There is no mention here of any of the islands, apart from Staten, as being still held by Argentina. Again,[64]

> Patagonia, which will continue[65] to be ours, and the eastern part of Tierra del Fuego [*i.e.* of the Isla Grande], which will remain[66] ours, are located on free seas and neutralized channels.

So were the islands, and in this context a mention of them, if not necessarily to be expected, would have been appropriate. There was none, nor was there any at the end of Señor Irigoyen's speech when, as part of his peroration, he said[67]:

> And on far-away Staten Island where, on a courageous and bold day, a valiant sailor from the Republic set foot, the country's flag will fly forever free.

Assuming the flag was also to fly over the other southern islands up to Cape Horn (still further away), and if this was considered to be the effect of the Treaty, here was an obvious opportunity for saying so. But most striking of all, are the places where Señor Irigoyen refers to the ambiguous meaning of the appellation "Tierra del Fuego" which, almost everywhere in his speech, he is clearly using (in the context) as denoting the Isla Grande. In the one passage in which he really does refer to the islands, though without any indication that some of them are considered to have been allocated to Argentina under the Treaty, he says this[68]:

> Tierra del Fuego is a geographical name which can be understood in diverse ways. Some geographers apply it to the group of islands to the south of the Strait of Magellan—[this would be the Isla Grande and the rest of the archipelago]. Others use this name to refer only to the principal island which is east of peninsula Brunswick—[*i.e.* the Isla Grande]. The remaining islands have received diverse names.
>
> I will take it in the broader sense, *even if it is its less correct one*—[stress added]—that is, I will understand by Tierra del Fuego the group of islands south of the Strait [of Magellan, *i.e.* the whole archipelago], from the Atlantic to the Pacific.

Here then, if anywhere, the speaker might have been expected to go on to indicate how the Treaty dealt with these various groups of islands. He did not do so. He continued with several paragraphs about the difficulty of determining where the Cordillera of the Andes died away in the Magel-

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[63] The context clearly indicates this—see final quotation in this sub-paragraph.

[64] Speech, p. 120.

[65] [66] These expressions are not really compatible with the fact that the Treaty made *attributions* of the territories named—and see the first citation in paragraph 116 below.

[67] Speech, p. 164.

[68] *Ibid.*, p. 90.

lanic region, and therefore by implication, where Chile "west of the Andes" ended and coalesced with the western islands, —and he then went on to speak about the division of the Isla Grande effected by the first half of Article III of the 1881 Treaty[69]:

> We have divided, then, in equal parts, the extensive island East of Peninsula Brunswick which is commonly known as Tierra del Fuego— [*i.e.* the Isla Grande].
>
> We left out Peninsula Brunswick as belonging indisputably to Chile. . . . To resolve the matter in the Continental part, we have taken the map of the Republic, and . . . we have admitted that the territory in question is that to the South of [parallel] 52° . . .

And it was here, after a few words about the character of the 52nd parallel line (part of the stretch Dungeness-Andes), that he ended with the passage quoted at the start of the present sub-paragraph, to the effect that Argentina still held, south of this line, "part of the territories of Tierra del Fuego [*i.e.* the eastern half of the Isla Grande, as he has just mentioned], Isla de los Estados, and the area between the said line, the Strait [of Magellan] and the foothills of Monte Aymond". Thus, a certain amount was said about the western islands, —not a word about those to the east or far south.

(vi) It almost looks therefore as if Señor Irigoyen, if not deliberately avoiding the question of the islands, was not much interested in it; but if so, it is not necessary to suppose that a statesman of this known ability and experience had simply overlooked the matter or was unaware of it. There is evidence in several places in his speech that he regarded the far south in general as a region scarcely worth having, —see for instance the following remark[70]:

> And what is Tierra del Fuego, especially for us?
>
> It is a sombre and unknown region, frozen at certain times of the year, which has resisted all investigations and all hopes. The maritime powers have travelled along its coasts and have left them: none of them has set foot on those inclement rocks.
>
> And were they not [*i.e.* "If they were not"] devoid of suitable conditions for population and prosperity, they would not see themselves today deserted and desolated, and visited only by an Evangelist Mission which reaches its beaches to dispense the benefits of its propaganda to the few savages that wish to hear it.

And, paradoxically, Señor Irigoyen quotes a high Chilean source as speaking to the Press in Chile about the results of the Treaty in similar terms[71]:

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[69] *Ibid.*, p. 91.
[70] *Ibid.*, p. 86.
[71] *Ibid.*, p. 21.

> The zones left to Chile on the continent and in Tierra del Fuego are so miserable that it is impossible that any kind of industry could be developed on a large scale there.

115. It seems to the Court therefore, that no firm conclusions can be drawn from the references to the Atlantic coasts and Cape Horn in Señor Irigoyen's speech, and none at all as to the situation, under the 1881 Treaty, of the eastern and southern islands which, as such, he seems never to have discussed, apart (significantly) from Staten Island. There is much else of great interest in the speech, but no one can read the full text without being struck by the extent to which it is taken up—not with the question of the islands, never really entered into—but of Patagonia north of the 52nd parallel and, above all, the Magellanic region. The speech was basically a defence of the renunciation of all Argentine claims to that region, and to the control of the Straits.

116. *Tierra del Fuego*—On the other hand, it can definitely be concluded that when Señor Irigoyen mentioned Tierra del Fuego in his speech, as he frequently did, he meant solely the Isla Grande, not the archipelago, unless he expressly indicated the contrary. This he did but once (in the penultimate passage cited in sub-paragraph (v) of paragraph 114 above)—and then only coupled with an admission that this "broader sense . . . is its less correct one". The limitation to the Isla Grande is clearly shown in several of the passages cited in that sub-paragraph, and there are others, for instance[72],

> . . . we ensure . . . the dominion over half the island called Tierra del Fuego, *over which our rights are questionable* [stress added];

and finally, referring to earlier negotiations with Chile conducted by a former Minister, Señor Frias, he said[73]:

> It is vital to bear in mind that by Señor Frias' proposal, the Peninsula Brunswick, together with all the islands to the west of it, was definitely recognized as Chilean. So that, when he was speaking of Tierra del Fuego, he could only be referring to the principal island, to *the large Island* [Isla Grande] if I may use the word, *which, in the maps of this area of the world, is generally called Tierra del Fuego*—[stress added].

These various passages, in particular the last one, afford very strong support for the Chilean view that the expression "to the east of Tierra del Fuego" in the Islands clause of Article III of the Treaty, meant east of the Isla Grande as such, a designation that could not have included the PNL group of islands. Also, the reference to "all the islands to the west of" Peninsula Brunswick, as being "definitely recognised as Chilean" confirms the conclusion arrived at in paragraphs 101-102 above, that certain western islands[74] cited by Argentina in support of the contention described in paragraphs 63 and 100, fell outside the scope of the 1881 Treaty entirely, being recognized as already Chilean.

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[72] *Ibid.*, p. 143. It may be noted that the half referred to, over which Argentine rights were stated to be "questionable", was the Atlantic side half.

[73] *Ibid.*, p. 67.

[74] *Supra*, nn. 55 and 56.

(ii) *The "Apuntes" (Notes, Comments) of October 1881*

117. The 1881 Treaty was ratified on 22 October of that year. Already on 27 July Señor Irigoyen had sent a circular communication to all Argentine diplomatic posts abroad enclosing—not the text of the Treaty itself which, pending its ratification, had not been published—but a statement of its main points. On 24 October, subsequent to ratification, he sent a certified copy of the final text to those same posts but, in the case of a small selection, added a personal letter, accompanied by commentaries ("Apuntes", "*mises au point*"), on the principal aspects of it, intended to serve those concerned as guidance for publicity purposes ("para que los tome como base en los comentarios que publique sobre el Tratado")[75]. The accounts that appeared in the Press of the countries concerned closely followed these commentaries, the relevant part of which in the present context ran:

> By this mutually honourable agreement the Argentine Republic remains owner of the vast region of Patagonia, of all the coasts on the Atlantic as far as Cape Horn; and the Strait [of Magellan] remains subjected to an international servitude for the benefit of world commerce.

Argentina has insisted on the effect of these words as a demonstration of the validity of her claim that the 1881 Treaty was regarded as conferring on her all the Atlantic islands on the eastern side of Cape Horn. The Court is unable to see it in that light. There is no specific mention of the islands as such. The phrase "all the coasts of the Atlantic down to Cape Horn" echoes previous rhetorical statements to the same effect, the figurative character of which has just been commented upon above, and is also open to the doubts about the exact meaning of the terms "coasts" and "Atlantic" noticed earlier in paragraph 65 *et seq.* Señor Irigoyen may have had no more than Staten Island in mind—the island that he had already characterized as being situated "sobre el Cabo de Hornos"—see paragraph 114 (ii) and (iii) above. It is not possible to say with any certainty; but be that as it may—and the Court has no wish to deduce from casual indications a conclusion that might be as little reliable as its opposite—such inferences as might otherwise be drawn from the "Apuntes" in favour of Argentina seem to the Court to be completely negatived by the further events now to be described, connected with three specific maps—the so-caled "Mapa García"; the "Irigoyen" map, as it may conveniently be called; and the 1882 "Latzina" map.

(iii) *Señor García and British Admiralty Chart No. 786*

118. Shortly before sending out the "Apuntes", as above described, Señor Irigoyen had authorized one of the recipients of these, Señor García, the Argentine Minister in London, to seek an interview at the Foreign Office, mainly to discuss the question of the neutralization

[75] The letters sound a note of caution—("Todo esto con reserva")—which was understandable, for in neither Argentina nor Chile were certain aspects of the Treaty popular, particularly as regards the Straits of Magellan. In Chile the permanent neutralization of the Straits effected by Article V of the Treaty, was a good deal criticized.

of the Straits of Magellan. The interview (with the Under-Secretary of State, Lord Tenterden) took place on 27 October 1881. Señor García was able to inform Lord Tenterden of the recent ratification of the Treaty. In reporting this to his Government (despatch of 30 October) he said (in the Argentine version of the English translation of this despatch—the Chilean version, where different, is given in square brackets)[76]:

> As Lord Tenterden told me that he was anxious [very much wished] to know the terms of that agreement [stipulation], I showed him the Treaty [expounded the Treaty to him] and, after translating [for him] the Article in question,[77] added that [telling him that] my Government had requested me to leave [charged me with leaving] a copy at Her Majesty's Ministry [for the Ministry of Her Majesty].

Thus there can be no doubt that Señor García was instructed to leave something purporting to be a copy of the Treaty, and did so. But there has been considerable disputation between the Parties as to what exactly this copy represented. Suffice it to say that it was a version that had appeared in an Argentine newspaper, the "Tribuna Nacional", on 24 July, the day after the signature of the Treaty. In this version, Article I (there called the "*Base Primera*") is identical in substance with the Treaty Article I, but there are differences of wording. Article II and the first—(Isla Grande)—half of Article III ("*Base Segunda*" and part of the "*Base Tercera*") are identical with the Treaty in all respects. In the Islands clause of this ("Tribuna Nacional") version of Article III (the rest of the "*Base Tercera*") there is a difference in the wording of the Argentine attribution[78], the effect of which was to make it substantially similar to the "Valderrama proposal" of 3 June 1881 that was not adopted—see paragraph 67 above, —and the Court has already (paragraph 68) indicated the reasons there are for thinking that it would in any case have made little essential difference to the scope of this attribution, even if it had been adopted, —while the Chilean attribution of "todas las islas al Sud del Canal Beagle hasta el Cabo de Hornos" is exactly the same in the "Tribuna" version as in the Treaty, with the exception of the spelling of the word "Sud" instead of "Sur". These details are noted here because of the Argentine contention that what was given to the British Foreign Office was an incorrect or superseded version of the Treaty (Señor García could not on 27 October have received the text as ratified on the 22nd[79]). The reason for this contention, already referred to in paragraph 71 *supra*, will be made clear in a moment,—but in any case the Foreign Office was not misled, for the

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[76] See Annex 45 to the Argentine Counter-Memorial, and Chilean Annex 46a.

[77] This would be Article V of the Treaty, neutralizing the Straits of Magellan.

[78] In the Treaty expression "los islotes proximamente inmediatos a ésta y las demás islas que haya . . .", etc., the "Tribuna" version adds the word "isla" after "ésta", replaces the "y" by a comma, and changes "las demás islas" to "demás" simply, thus reading ". . . los islotes proximamente inmediatos a ésta isla, demás que haya . . .", etc. It has already been indicated (paragraph 68) why, given the retention of "demás" and "al oriente de", etc., it made no real difference to speak of "islotes" rather than "islas".

[79] This might account for the otherwise inexplicable official communication by an Argentine representative of a version of the Islands clause now claimed by Argentina herself to be incorrect and unfavourable to her, and also not adopted in the Treaty text.

official annotation on the back of what Señor García handed over reads "This is not the actual Treaty but the bases of what it is believed has been signed."[80]

119. Simultaneously with the text that he communicated on this occasion, Señor García made Lord Tenterden a presentation of a copy in French of a work entitled "La Conquête de la Pampa" by an Argentine geographer, Lt. Colonel Olazcoaga, together with—(Argentine version)—"the plan of the southern regions which contain the new frontier". The Chilean version of this is "the plan of the southern regions which includes the new boundary"—thus clearly relating the word "includes" to "the plan", whereas the plural sense of the Argentine "contain" relates that word, not to the plan, but to "the southern regions". The original Spanish text appears to be "el plano de las regiones australes que encierra (not "encierran") la nueva frontera". Therefore the correct English rendering is that given by Chile ("includes" or "contains"), from which the natural inference would be that the plan was one that showed the Treaty settlement. This plan has, in fact, never been found, and Argentina has contended that it was not a plan of the settlement at all, but a map in the Olazcoaga book showing the frontier with the Indians in the Pampa. Yet Señor García's account reads as if the plan he handed over was not in the book itself or part of it, but separate. The map incorporated in the book (which appears as No. 11 in the Counter-Memorial volume of Argentine Plates) concerns a totally different region, on the Río Negro, not the Treaty areas at all; and Señor García could scarcely, in the context of giving Lord Tenterden information about the Treaty, have handed him the "map-of-the book" as being what he called "the plan of the southern regions which includes the *new* boundary"—(stress added).

120. Be these things as they may, the real point is different. Whatever was received from Señor García was passed on to the British Admiralty, with a request that a map should be prepared showing the new boundaries on the basis of the information as received. This was done, and numbered as Admiralty Chart 786, sometimes referred to as the "1881 Admiralty Map"[81], figuring in the documentation of the case as Chilean Plate No. 20. As sent to the Foreign Office by the Admiralty, it is endorsed with an official annotation reading "F.O. 6/372 (extracts). Map to illustrate Boundary Treaty between Chile and Argentine Republic—*as commd. [communicated] by Señor García Oct. 27 1881* [stress added] and procured from the Admiralty by the Librarian"[82]. It shows

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[80] Annex 49 to the Argentine Counter-Memorial.

[81] The Court has not overlooked the earlier Admiralty Chart 789, published on 11 July 1881, *before* the signature of the Treaty, though apparently give a later serial number (Argentine Counter-Memorial Plate 10 and Chilean Plate 173). However the Court believes that the explanation of this map given in paragraph 133 (pp. 180-181) of the Chilean written Reply is the correct one.

[82] To be noted is the definite statement that Señor García did communicate a map illustrating the Treaty settlement. The Librarian and Keeper of the Papers (*i.e.* Chief Archivist) at the Foreign Office, at this time, was Sir Edward Hertslet, a well-known authority on boundary-treaties, and the author of several books on the subject.

the line as running along the south shore of the Isla Grande; and the words "Beagle Channel", placed at the exit, clearly indicate the northern arm, not the southern arm by Navarino and Lennox Islands. Argentina has contended that since, as she maintains, this map was based on incorrect information concerning the contents of the Treaty (*supra*, paragraph 118), its value as evidence is "absolutely nil". But the information given to the Admiralty was not in any case incorrect in respect of Chile's attribution of the islands south of the Beagle Channel, and for reasons already stated (*ibid.*) was unlikely to mislead concerning Argentina's attribution.

121. Moreover, it so happened that on 26 October 1881, the British Minister in Santiago (Chile) had received from the Chilean Foreign Ministry a copy of the Treaty as ratified, and an illustrative map, appearing in the case as Chilean Plate No. 16—identical with a number then made available to foreign Legations in Santiago and by them sent to their Governments (Chilean Plates Nos. 13-15 and 18)[83]. It quite clearly showed the PNL group, both by line and colouring, as Chilean. This map was passed on by the Foreign Office in London to the Admiralty, under cover of a letter dated 15 December 1881, as having been "received from Her Majesty's Minister at Santiago showing the boundaries agreed to under the Treaty recently concluded between the Argentine and Chilean Republics". The Admiralty also received the same map (shown as Chilean Plate No. 17) direct from the Hydrographic Department at Santiago—(see paragraph 131 below). It seems to the Court inconceivable that the British Admiralty, thus obtaining information about the same Treaty from both the Parties to it, and finding (if that had been the case) some significant discrepancy, would not at once have started an enquiry, especially as it either just had drawn up, or was in the process of drawing up, a map, chart 786, based on the information obtained from one of these sources. Clearly the Admiralty interpreted the expression "to the south of the Beagle Channel", which appeared in what was received from both Parties, in such a way as to leave the PNL group to Chile. Nothing received from the Argentine side contradicted this interpretation, while that coming from the Chilean side confirmed it. The Court also finds it difficult to believe that the Argentine Government could have remained in complete ignorance of the dissemination to foreign Legations in Santiago of a map so entirely at variance (in respect of the course of the Beagle Channel) with the view that Argentina is now alleged to have then held concerning the attribution to her of the PNL group. True, Argentina was not at the time in diplomatic relations with Chile, but she maintained a Consul-General in Santiago—(Chilean written Reply, pp. 337-8). Yet no record exists of any Argentine protest made, or dissent expressed, —although in the course of the present

[83] In his despatch of 27 October transmitting the text of the Treaty and the map, the British Minister, Mr. J. Pakenham, said that he also enclosed "three copies of a map defining the limits as now established, and which, as they were given to me yesterday by the Under-Secretary of State at the Moneda [Chilean MFA], may I presume be looked on as authentic for all practical purposes"—(see Chilean Annex 46 at p. 148).

proceedings the probative value of the Chilean map was challenged, — a matter on which the Court will comment later. Even more significant, however, was the next incident, to which the Court now comes.

(iv) *The "Irigoyen" map*

122. This map, appearing in the documentation of the case as Chilean Plates Nos. 21 and 175, has already been mentioned in an earlier connection (paragraph 101). On 20 December 1881, Mr. George Petre, British Minister in Buenos Aires, who had already, at the end of October, sent the Foreign Office in London an (as he put it) "official copy of the Boundaries Treaty . . . of July 23", wrote again enclosing two copies of "the map showing the line of frontier established by the Treaty" which, he added, "Dr. Irigoyen has been good enough to send me privately". This map, Mr. Petre explained, showed the results of the Treaty attributions in colour, and

> the part which is coloured a deeper shade of crimson, comprising the Straits of Magellan, half of Tierra del Fuego [*i.e.* of the Isla Grande], *and all the Southern islands* [stress added] represents what has been actually ceded to Chile by the recent Treaty.

The part coloured the "deeper shade of crimson" included the PNL group; and Mr. Petre concluded, significantly, that the Argentine Republic, as the Foreign Office would see, was "left in full possession of the Atlantic seaboard". This, coupled with the mention of "all the southern islands" as being attributed to Chile, shows that Mr. Petre did not, on the basis of this map, understand the Atlantic seaboard as extending to or comprising the southern islands, amongst which the PNL group is numbered.

123. The Chilean contention was that the importance of this incident lay in the fact of the *communication* of the map to a foreign diplomat who would be certain to send it to his Government[84], —and by a Minister who was not just any Minister, but the Foreign Minister of Argentina who had himself negotiated and signed the Treaty. This could not but constitute the strongest possible evidence of "the intentions of the Argentine Government when concluding the Treaty and their understanding of it immediately afterwards"[85]. Argentina contested this on a variety of grounds, mostly addressed to the map itself; it was not an official or authoritative map but one published in a popular periodical, the "Ilustración Argentina"; its colouring was suspect; it contained errors[86]; its preparation had been begun before the text of the Treaty

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[84] The terms of Mr. Petre's despatch to the Foreign Office, enclosing the map, imply that he must have regarded the latter as representing Señor Irigoyen's own view as to the nature of the Treaty settlement. The annotation made on the map itself in the Foreign Office, amongst others by Sir. E. Hertslet (see n. 82 *supra*), show that there too it was regarded as illustrative of the settlement.

[85] See Chilean Memorial, paragraph 26, and Reply, paragraph 141.

[86] This is admitted to have been true, but only in minor respects not affecting the issue.

was published, and it was based on an earlier superseded version and had appeared (on 10 November) before any changes could be made, —finally, it was not communicated officially, but privately by Señor Irigoyen on a personal basis.

124. With the possible exception of the last, it seems to the Court that these objections are irrelevant because they do not touch the main point on which Chile relies, namely not the map itself (though Chile of course regards it as correct) but the fact of its communication to the British Minister by Señor Irigoyen himself, which appears inconceivable unless be regarded it as accurately depicting the settlement. That this communication may not have amounted to an act of the Argentine Government as such, does not seem to the Court to matter, since it would necessarily be taken by Mr. Petre (and Señor Irigoyen could not have supposed otherwise) as meaning that the boundaries and attributions shown on the map as resulting from the Treaty, represented Señor Irigoyen's own view of those results. What counted was official conduct in relation to the map, —and a communication of this kind, made by a Foreign Minister in office, to a foreign Head of Mission *en poste*, cannot be evaluated as if it were a purely private act not in any way binding on the Government. But in any event, that is not the way in which the Court finds it necessary to look at the matter. It sees the episode simply as one that has a very high probative or supporting value in favour of the conclusions earlier arrived at (paragraphs 94-98) that the negotiators of the Treaty—of whom Señor Irigoyen was one—regarded the Beagle Channel as flowing along the northern arm past Cape San Pío and Nueva Island. The map sent by Señor Irigoyen to the British Minister, showing the Treaty attributions by colour, brings out very vividly how the south shore of the Isla Grande with, of course, its appurtenant waters, by its coincidence with the north shore of the Channel, including the north shore of the northern arm, places the PNL group south of the Channel and within the Chilean allocation.

125. The Court concludes that it is impossible to reconcile Señor Irigoyen's communication of a map so drawn and coloured, with the view that he could have had the PNL group in mind when he made the observations that he did in his speech to the Chamber of Deputies, and in the "Apuntes", concerning the Atlantic coasts and Cape Horn. Whether this was because he did not regard the coasts of these islands as being Atlantic coasts within his notion of that expression, or for some other reason, it is impossible to say, —but the fact remains.

(v) *The 1882 "Latzina" map*

126. If anything more were needed to confirm the view that the map sent to Mr. Petre in December 1881 did indeed represent Señor Irigoyen's own opinion concerning the effect of the Treaty in regard to the islands, it would be amply afforded by the publication under his *aegis*, about a year later, of what has been known in the case as the 1882 "Latzina" map (Chilean Plate No. 25). This map is regarded by Chile as the first official Argentine map to be produced under government auspi-

ces—though its official character was subsequently denied by the Argentine Government, and this is discussed later (see paragraphs 153-156 *infra*). The point is however that the map was brought out under the auspices of the President of Argentina, and of Señor Irigoyen (who had by then become Minister of the Interior), for inclusion in, or to go with, a publicity work entitled "The Argentine Republic as a field for European Emigration", and subtitled "A statistical and geographical review of the country, and its resources, with all its various features". Supervision was entrusted to Dr. Francisco Latzina, Director of the National Statistical Office.

127. This work, headed "Publicación Oficial", was issued in five languages (Spanish, French, English, German and Italian). It included a map prepared by the lithographic firm of Stiller and Laas. The Argentine Congress officially approved the project and authorized the publication of a large number of copies for distribution throughout Europe. Like the Irigoyen map (*supra*, paragraph 122) this Latzina map leaves no doubt as to the attribution to Chile of the PNL group of islands. In 1883, Señor Irigoyen, in making his Report to the Argentine National Congress, had occasion to assess the value of the publicity project, when requesting additional funds to continue the distribution. In the course of his Report he declared: "The map which Dr. F. Latzina was entrusted with, was printed last year, and distributed in Europe and America with excellent results"—(Chilean written Reply, paragraph 123 on p. 334). It cannot be accepted that the chief negotiator for Argentina of the 1881 Treaty would thus have given his personal backing to the publication of a map which showed the islands as Chilean unless, as previously, he believed this to be a correct representation of the Treaty settlement.

128. The Latzina map of 1882-3 provides an excellent example of the relevance of a map not so much for its own sake—(it could, theoretically, have been inaccurate)—but for the circumstances of its production and dissemination, making it of high probative value on account of the evidence afforded by this episode, namely of official Argentine recognition, at the time, of the Chilean character of the PNL group. The force of this, as illustrative of Argentine official opinion in the immediate post-Treaty period, is therefore in no way lessened by the fact that the 1882 Latzina map fell out of favour with the authorities a decade or so later,[87] or that Dr. Latzina himself, having again, in 1888, published a map (Chilean Plate No. 48) showing a Chilean attribution for the PNL group, proceeded the year after, in 1889, to publish or at least write an introduction to a work containing a map (Argentine Counter-Memorial Plate No. 25) showing the group as Argentine—(this is discussed in paragraph 157 below).

[87] After a change in official Argentina policy about map production—as to which see *infra*, paragraph 156.

(*b*) *Chilean acts in the immediate post-Treaty period*

129. The point about Argentine conduct in the post-Treaty months, as above described, is simply that it was not consistent with the interpretation of the Islands clause of the Treaty which Argentina is now maintaining, and which she contends was the one entertained by the Argentine authorities of the time. Alternatively, as in the case of Señor Irigoyen's speech, Argentina's conduct was too uncertain and inconclusive to afford that interpretation any real support. The corresponding Chilean acts seem to the Court to justify a quite different conclusion. This is not because Chile could by her own acts confer upon herself rights or territorial attributions not provided for by the Treaty, but simply because these acts were consistent with, and bear out, the interpretation of the Islands clause which Chile now, *as then*, puts forward as being the correct one.

(i) *Señor Valderrama's speech of September 1881*

130. The Chilean Foreign Minister and chief negotiator of the Treaty for Chile during its latter stages, Señor Valderrama, also made a speech to his Chamber of Deputies in the weeks following upon its signature (as Señor Irigoyen in Buenos Aires had done). The relevant passage about the islands occurring in this speech has already been quoted in paragraph 66 (3) above. Unlike that of Señor Irigoyen, it contained a clear statement concerning the effect of the Treaty in this connexion (Chilean Annex No. 41) at p. 113):

> The Treaty ensures for Chile dominion of . . . all the islands to the south of the Beagle Channel and to the west of Tierra del Fuego . . .
>
> . . .

and "in other words" there belonged to Chile

> all the territories extending to the south [of the Straits of Magellan] with the exception of Tierra del Fuego bathed by the Atlantic and the Island of los Estados . . .

(ii) *The Chilean Hydrographic Notice No. 35/233 and "Chile's 1881 Authoritative Map"*

131. The Chilean Hydrographic Notice issued on 10 November 1881 was entirely consistent with the above quoted statement. After referring to the line from Cape Espíritu Santo to the Beagle Channel, it stated that the boundary went.

> thence along this channel until it entered the Atlantic. Thus the South-Eastern point of Tierra del Fuego and the island of Los Estados remain in the possession of the Argentine Republic.

The whole drift of this passage suggests a course along the northern arm of the Channel. When this Notice was sent by the Chilean Hydrographic Department to the Hydrographic Department of the British Admiralty, a map was attached to it which placed the Chilean view beyond all doubt (Chilean Plate No. 17). This was in fact the same map as that which will be discussed in paragraphs 132-134 below. It showed the PNL group as Chilean both by colouring and by line. The line is of interest, being

stated to be that of the "proposal of July 1876". This was one of the original Irigoyen "Bases" of that year, set out in paragraph 25 above, and reflected in the eventual 1881 Treaty without any change of substance so far as concerned the "Islands clause".

132. The map just referred to, which subsequently became known as "Chile's 1881 Authoritative Map" (Chilean Plate No. 16), or as the "Prieto map" (after its cartographer), had been published under Government instructions by the Chilean Hydrographic Department, in August 1881, and appeared in the Chilean papers "Mercurio" and "Ferrocarril". Because at that time the Treaty, although signed, had not yet been approved by the Chilean Congress nor, hence, ratified, the legend on the map did not refer to the Treaty as such, but showed the Treaty attributions in colour against the indication "proposal of June 1881" ("proposición de junio de 1881"), which was in fact the same as what eventually appeared in the Treaty text signed on 23 July. The line showing the Beagle Channel boundary was labelled as being that of the "proposal [*i.e.* "Basis"] of July 1876" which, as already mentioned, was in fact equally the one reflected in the Treaty; —and to place the matter beyond doubt the following note was printed on the map:

> Esta división coincide con la de 1876 . . . en todo su transcurso al través . . . del Canal Beagle.
>
> This division coincides with that of 1876 . . . the Beagle Channel.

That this map also showed—by means of an entirely different pecking—the line of a proposal of 1879 that was not adopted, does not seem to the Court to affect in the slightest degree the *bona-fides* of the indications given on the map in regard to the other lines and divisions which, in the opinion of Chile, *had* been adopted.

133. This same map was also that mentioned in paragraph 121 above as having been made available to foreign diplomatic and consular posts in Santiago, and by them sent to their respective Governments at varying dates, in all cases *soon after the ratification and publication of the Treaty* (Chilean Plate Nos. 13, 15 and 18). These included (shown as Chilean Plates Nos. 16 and 17) the maps received by the Foreign Office and Admiralty in London in November-December 1881 (see paragraph 131). An identical map was received by the Royal Geographical Society in London, in January 1882 (Chilean Plate No. 19), and one had also been received in Paris from the French Minister in Santiago (the Baron d'Avril), enclosed in his despatch of 24 October 1881; while in the Bulletin of the Société de Géographie (7th Series, 3rd Vol.; Paris 1882, First Quarter), the report of the Secretary-General, M. Charles Maunoir, on the 1881 Treaty contained the following statements:

> La solution de cette année s'accorde à peu de chose près avec les propositions présentées en 1876. . . . D'après le traité le Chili . . . a toutes les îles de l'ouest et du sud. La République Argentine, *avec la seule îles des Etats* [stress added] et le tiers de la Terre de Feu, aura la large zone continentale qui renferme [la Patagonie].

134. Argentina has challenged the probative value of the Chilean Authoritative, or Prieto, Map, on grounds similar to the principal ones

urged against British Admiralty Chart No. 786 (*supra*, paragraph 123), namely, in particular, that having emerged before the *publication* of the Treaty, it was based on an older and incorrect version of it, —specifically, on the Valderrama proposals of 1881 (see *ante*, paragraph 67) which had not been accepted, and which did not appear in the final, definitive, text of the Treaty. But having regard to what is stated in paragraphs 123 and 132 above, the Court must regard this contention as not well-founded. The map stated quite explicitly that it exhibited the boundary-line resulting from both the June 1881 and July 1876 proposals, which coincided "over the whole of its course through the Beagle Channel"—(and on that basis showed the PNL group as Chilean). It seems scarcely possible that a map bearing indications of this kind should have been prepared under the *aegis* of the official Chilean Hydrographic Department, and subsequently published and disseminated, unless it was a *bona-fide* representation of the Chilean view of the effect of the Treaty, the terms of which, though not yet published, were of course fully known to the Chilean authorities. It is not credible otherwise that the latter should have sponsored this map.

135. But, as observed earlier—the time for the Argentine authorities to have challenged the authenticity of the map was during the period of its original emergence or reasonably soon after, instead of many years later. It is before minds have had time to change or to visualize possibilities not originally thought of, that the real trend of contemporary acts and attitudes can most clearly be seen. Unquestionably, the map almost immediately became well-known in Buenos Aires. According to one account published in the Argentine newspaper "La Nación" in February, 1895 (Chilean Annex, No. 364):

> *a few days* [stress added] after this document (the Treaty of 1881) was signed, a map of the Magellanic region arrived in Buenos Aires, issued by the Chilean Hydrographic Office whose seal it bears, circulated by "El Mercurio" of Valparaiso . . . [This map] was considered official on account of its origin, and . . . has served as a pattern for the dozens of maps that even now [*i.e.* fourteen years later] are sold in the book stores of Buenos Aires *and are in use in the schools of the Republic* [stress added].

It is not relevant for present purposes that the writer of this article, Dr. Francisco Moreno, disagreed with what the map showed as being the boundary along the north-south line of the Andes—always a controversial matter, as the two subsequent arbitrations of 1898-1902 and 1965-66 were to show. He was a recognized Argentinean expert, a member of the standing Argentine-Chilean Boundary Commission (set up in consequence of Article IV of the 1881 Treaty), whom Señor Irigoyen had consulted many years before, and whom he quoted in his speech earlier referred to[88]. He in no way disagreed with the Chilean 1881 map as regards the way in which it showed the result of the attributions made under the Islands clause of the Treaty. On the contrary, he considered the PNL group to be Chilean. The proof of this is contained in his

[88] See his August-September 1881 speech (paragraph 113 and n. 60 above), at pp. 137-138. See also n. 9 above.

notable memorandum of 23 July 1918 (Chilean Annex No. 113), further referred to in paragraph 158 below. At the present juncture, the object of the above citation from "La Nación" is simply as evidence that the Chilean version of the effect of the Islands clause of the Treaty, and the map illustrating it, were well-known in Argentina immediately after the conclusion of the Treaty; and neither then, nor for a long period thereafter, did these elicit any express dissent.

2. *The cartography of the case considered as corroborative material*

136. The present case has been noteworthy for the number, quality and interest of the maps, charts, plans and sketches produced by both sides. Apart from many furnished loose, in leaf form, or enclosed in folders, the Parties have, between them, tabled seven large folio volumes of plates of great beauty, numbering over 350 in all. Many of them show more than one map, so that the total for maps exceeds 400. Having regard to this; to the care and trouble taken by the Parties in the preparation and presentation of this cartography; to the prominent part it has played in the case; and to its usefulness for understanding the physical and geographical aspects of the dispute; —the Court proposes to consider the question of its legal effect, both generally and as regards certain particular examples of it, even though the Court's decision has been reached on grounds independent of cartography as such—principally those indicated in paragraphs 55-111 above. An additional reason for so proceeding is that the Court has already had occasion to refer to and comment on certain particular maps or charts[89], not so much for their value as actual cartography, but because of the part they played in events closely connected with the conclusion of the 1881 Treaty. The Court will now consider the cartography from the point of view of the principles which, in the present case, are applicable to its evaluation; its general weight; and also, in respect of certain individual maps, for the light they throw on different aspects of the dispute.

(*a*) *Relevance of cartography as such*

137. Historically, map evidence was originally, and until fairly recently, admitted by international tribunals only with a good deal of hesitation: the evidence of a map could certainly never *per se* override an attribution made, or a boundary-line defined, by Treaty, —and even where such an attribution or definition was ambiguous or uncertain, map evidence of what it might be was accepted with caution. Latterly, certain decisions of the International Court of Justice have manifested a greater disposition to treat map evidence on its merits[90]. In the present case it is not a matter of setting up one or more maps in opposition to

[89] *I.e.*, principally, Admiralty Charts 554 and 1373; and 786 and 789; the "Irigoyen" and 1882 "Latzina" maps; and the 1881 Chilean "Authoritative" map—see *supra*, paragraphs 58 (3), 90, 119-122, 126, and 131-133.

[90] See the cases of the *Minquiers and Ecrehos* (I.C.J. Reports 1953, p. 1); *Sovereignty over Certain Frontier Land* (Reports 1959, p. 209); and *Temple of Préah Vihéar* (Reports 1962, p. 6).

certain Treaty attributions or boundary definitions, but of the elucidation of the latter, —in which task map evidence may be of assistance. The problem involved in the present dispute arises from the difficulties created by the structure and language of the 1881 Treaty already discussed, not from its incompatibility with some map, or *vice versa*, —and the solution has to be found through the ordinary processes of interpretation, to which cartography may contribute. Thus maps or charts in existence previous to the conclusion of the Treaty in 1881 might be relevant if, in the circumstances, they could (for instance) throw light on the intentions of the Parties, or give graphic expression to a situation of fact generally known at the time or within the actual, or to be presumed, knowledge of the negotiators. Equally, maps published after the conclusion of the Treaty can throw light on what the intentions of the Parties in respect of it were, and, in general, on how it should be interpreted. But the particular value of such maps lies rather in the evidence they may afford as to the view which the one or the other Party took at the time, or subsequently, concerning the settlement resulting from the Treaty, and the degree to which the view now being asserted by that Party as the correct one is consistent with that which it appears formerly to have entertained. Furthermore, as has been seen in the case of the "Irigoyen" and 1882 "Latzina" maps (*supra*, paragraphs 122-125 and 126-128), the importance of a map might not lie in the map itself, which theoretically might even be inaccurate, but in the attitude towards it manifested—or action in respect of it taken—by the Party concerned or its official representatives. Its effect may sometimes be indirect, yet specific, as for instance in the case of the map (Chilean Plate No. 34) published in 1885 by the Argentine Geographical Institute "under the auspices of the Honourable National Government", one aspect of which has been mentioned earlier, in paragraph 65 (*e*), —and see further paragraphs 148 and 157 (*d*) below.

(*b*) *The Argentine attitude regarding the cartography of the case*

138. Since, as a matter of bulk and weight, the cartography of the case favours Chile, at least in respect of the number of maps that, either by line, colour or toponymy (indication by place-name), show the PNL group as Chilean, it is the character of the Argentine objections to this cartography that the Court has principally to consider; —for, as was only to be expected in these conditions, Argentina, although herself adducing many maps, has questioned the probative value of cartography, not only as regards particular specimens of it, but generally, as a category, except in a narrowly restricted class of cases. Accordingly, Argentina has contended that, in the first place, a clear distinction must be drawn between, on the one hand, privately printed and published maps, having no official endorsement, and, on the other hand, official or quasi-official maps which, whether actually produced and published by an agency of the Government, have appeared under its *aegis* or with its official *imprimatur*, —or else have subsequently been officially adopted. The Court itself, while willing to consider the matter on the basis of this distinction, feels that in the circumstances of the present case it is only

of relative importance whether a map is, technically, "official" or not. At a time when many governments did not possess intramural printing or publishing facilities of their own, and had to rely on outside resources, much that appeared bearing such indications as "under government auspices", "with government approval", "at government request" must rank as having at least some quasi-official status. *Per contra*, even an indubitably official map, produced and published by the government as such, is not thereby rendered infallible or objectively correct. But it will in principle be good evidence of the view the government took, or wished to be regarded as taking, at the date of publication; and it may, for that reason, assist, or, as the case may be, not assist, the contentions that such government advances in a subsequent litigation, or at a later date. The Court will, however, now consider the matter on the basis of the distinctions propounded on behalf of Argentina.

139. *The Argentine view on non-official cartography*—With regard to this category of maps, charts and plans, Argentina maintains, first, that it is neither attributable to, nor imputable against the Government. This is in principle correct, subject to such exceptions as may be entailed by privately produced and printed maps that nevertheless have a quasi-official aspect as just described. Next, Argentina contends that non-official cartography lacks all real probative value unless a more or less complete concordance of view is thereby manifested, —and points to some twenty maps of private origin, eight of them Argentine, and twelve produced in third countries (but none Chilean, *vide* paragraph 144 (2) below), which show the PNL group as Argentinean[91]. Hence, whatever the number that show the contrary, there is no "concordance": "Many good and important maps", it was said, "favour the Argentine position, and the only generalization that could be made—if one must be made—is that most possible interpretations of the Treaty could find a map to support them."[92] This is in itself true, although, for reasons to be stated later, the Court believes that the question of whether there is concordance or not is closely bound up with, and needs to be considered in relation to, the period within which the maps concerned were published. In any event the Court thinks that the attitude adopted by Argentina is too restrictive. As a matter of normal use in such a context, the notion of concordance must mean a general, and not necessarily an absolute, unqualified, concordance. But in the opinion of the Court, concordance as such is an unrealistic test for a dispute in which there is much to be said on both sides. What counts is not concordance (hardly to be expected) but preponderance, provided it is sufficiently marked and that its components are sufficiently significant having regard to the point sought to be established. When a tribunal is faced by a conflict of evidence, it cannot simply rule it all out on that

[91] Oral Proceedings, VR/16, p. 11. The more important of these maps are the subject of special comment in paragraphs 149-161 below.

[92] *Ibid.*, p. 22. But as will be seen later, some of the "possible" interpretations of the Treaty settlement represented on certain of these maps are such as could not conceivably be derived from any reading of the Treaty.

account, unless the weight of it on each side, qualitatively or quantitatively, really does balance and cancel out that on the other. Where there is a definite preponderance on the one side—particularly if it is a very marked preponderance[93]—and while of course every map must be assessed on its own merits—the cumulative impact of a large number of maps, relevant for the particular case, that tell the same story—especially where some of them emanate from the opposite Party, or from third countries[94], —cannot but be considerable, either as indications of general or at least widespread repute or belief, or else as confirmatory of conclusions reached, as in the present case, independently of the maps.

140. *The Argentine view of official and semi-official cartography*—Here the Argentine contention is that official maps or charts have probative force only if they come within the category of what might broadly be called "agreed cartography", —and this they would do only in two classes of cases, —viz. for present purposes (i) if the map concerned could be regarded as being part of the 1881 Treaty settlement as such, being either attached to the Treaty, or, though not so attached, referred to in it, or else shown to have been utilized or worked upon by the negotiators *in common*; (ii) if, though not part of the Treaty settlement itself, under any of these heads, the map had been subsequently drawn up by the Parties or agreed upon by them, as correctly representing the settlement, or if they agreed upon an independent map as doing so. With regard to class (i), it is evident that no map in the present case comes within it, unles it were British Admiralty Chart No. 1373 and the earlier maps on which it was based (*supra*, paragraph 90)[95]; but it has already been shown (*ibid.*) that this chart is "neutral" on the question of the eastern course of the Beagle Channel, or at best inconclusive. With regard to class (ii), Argentina maintains that there are no maps that have ever been agreed upon between the Parties as correctly illustrating the Treaty settlement, even if a tacit process by conduct were admitted to be sufficient to constitute agreement—e.g. through the parallel, though independent, utilization of the same maps, or of maps showing the same thing[96].

141. Again, the Court believes that these views are too restrictive. There was certainly no map that was actually part of the Treaty settlement[97]: if there were, it would of course be conclusive, and there could be no dispute unless some technical error in it came to light later. Much the same would apply in the case of any map subsequently agreed upon between the Parties, —and none exists in the present case. But it is

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[93] Apparent preponderance may of course be reduced when some maps are merely copied from others, or based on a common ancestor.

[94] But allowing for the fact that such maps are often taken from nationally produced ones.

[95] And also perhaps Admiralty Chart No. 554 (see paragraph 58 (3) *supra*); but this had no direct relevance to the region of eastern Beagle Channel.

[96] Chile, as will be seen later, contends that in the period of maximum significance, namely in 1881 Treaty decade, Argentine and Chilean maps were in substantial accord.

[97] There were however certain maps closely linked with the Treaty's emergence—see paragraph 162 below.

precisely in the absence of such reliable indications that boundary disputes come before international tribunals; and it cannot be the case that non-agreed maps, produced, acted upon or adopted unilaterally by a Party, even if they have no conclusive weight or effect of themselves, must, merely on account of their unilateral provenance, be regarded as devoid of all value. They can have such value, in varying degree, in any of the ways described in paragraphs 137-139 above.

(*c*) *Applicable principles of evaluation*

142. Notwithstanding the foregoing observations of a genral character, the fact remains that when it comes to the actual use and evaluation of cartography, as part of the process of deciding a dispute, generalizations are in practice only of secondary value. In relation to each chart or map, whether official, quasi-official or non-official, certain concrete questions have to be asked. In such a context as the present one, the chief of these would be:

(1) *Provenance and indications—(a) Maps emanating*[98] *from the Parties themselves*—Clearly, a map emanating from Party X showing certain territory as belonging to Party Y is of far greater evidential value in support of Y's claim to that territory than a map emanating from Y itself, showing the same thing. Yet that is not the whole story, —for (subject to the chronological aspect considered in sub-paragraph (3) below) a consistent or very general emission from Y of maps favouring its claim will at least show a settled belief in the validity of that claim; while the opposite, or a low level of such emission, though in no way conclusive *per se*, will tend to show, if not necessarily disbelief or disinterest, at any rate doubt or absence of concern or serious conviction.

(2) *The same—(b) Maps produced in third countries*—While maps coming from sources other than those of the Parties are not on that account to be regarded as necessarily more correct or more objective, they have, *prima facie*, an independent status which can give them great value unless they are mere reproductions of—or based on originals derived from—maps produced by one of the Parties,—or else are being published in the country concerned by, or on behalf, or at the request of a Party, or are obviously politically motivated. But where their independent status is not open to doubt on one or other of these grounds, they are significant relative to a given territorial settlement where they reveal the existence of a general understanding in a certain sense, as to what that settlement is, or, where they conflict, the lack of any such general understanding.

(3) *The temporal or chronological factor*—The principles indicated in sub-paragraph (1) above, however valid in themselves, neverthe-

[98] The word "emanating" is used here because the principle involved is the same whether the maps are official or not, though it may apply more forcefully in the case of the former.

less require to be applied in close relation to the temporal or chronological setting in which the map concerned appears. This element can be relevant with respect to both the above classes of cases, but is particularly so—indeed constitutes an essential ingredient—in the evaluation of the first, —namely maps emanating from the Parties. The significance of a map illustrating a territorial settlement or disputed boundary may vary greatly according to the date when, or the period within which, it is issued or published. Where there is controversy, the implications of any given map can be correctly assessed only if account is taken of the date of its publication, —and also of the circumstances of the time. Thus, maps appearing contemporaneously with the territorial settlement or within a relatively short period after it will, other things being equal, have grater probative value than those produced later when the mists of time have obscured the landscape and the original participants have left it. Clearly, since the object of a study of the cartograhy of a dispute, where a territorial settlement by treaty is involved, is to assist in understanding what the settlement was, the closer in date the map is to the period of the treaty's conclusion, the higher its probative value will be. Similarly, as a broad proposition, maps produced before any controversy over the settlement has arisen will tend to be more reliable than those coming afterwards.

143. It is in the light of the considerations set out above that the Court will now attempt a limited evaluation of the cartography of the case generally, and an assessment of the role of certain of the more important individual maps, in so far as this has not already been done in earlier sections.

(*d*) *Some general facts*

144. Without intending to attach undue importance to them, the Court has noted the points tabulated below. For these purposes it has to be understood (i) that an Argentinean (or Chilean) map means a map of Argentine (or Chilean) origin or provenance—*i.e.* authorship or production—irrespective of which Party has submitted it; (ii) that, in consequence, the notion of maps "submitted" by Argentina (or Chile) is not confined to Argentinean or, as the case may be, Chilean, maps, but covers any map submitted by the Party concerned, whether Argentinean or Chilean; and also covers (iii) "third country maps", which term is used to denote those originating in other countries—and these again may be amongst those submitted by either side. The points of fact that seem relevant are as folows:

(1) Without attempting any exact computation, it can be said that out of those maps (submitted by either Party) that depict an attribution of the PNL group by line, colouring or toponymy (*i.e.* by nomenclature, for instance placing the words "Beagle Channel" along or partly along, or juxtaposed to, an arm of the Channel), the number showing an attribution to Chile is markedly the greater.

(2) It appears that there are no Chilean maps that show the PNL group as Argentinean. Hence the maps submitted by Chile that do show

this are all Argentinean or third country maps. This therefore also applies to any maps submitted by Argentina that show the group as Argentinean: they are not Chilean maps.

(3) On the other hand there are many Argentinean, as also third country, maps that show the group as Chilean. Those Argentinean maps that show an Argentine attribution are mostly of doubtful value for the reasons stated in paragraphs 149-160 below.

(4) No map at all, whether Argentinean or Chilean, traces a dividing line along the Cape Horn meridian—(for the significance of this see paragraph 62(*c*) *supra*).

(5) Whereas Chilean cartography, whenever attributive of the PNL group, consistently shows a division along the northern arm of the Beagle Channel, between the Isla Grande of Tierra del Fuego and Picton and Nueva Islands, the Argentine cartography that rejects this division is far from adopting a consistent alternative, or one that always conforms to the present Argentine claim to a boundary running along the whole southern arm between Navarino and Picton and Lennox Islands. Many Argentine maps variously show lines corresponding to all those that are possible after Picton Island is passed, when exiting from west to east, as described in footnote 2 to paragraph 3 above. They reflect the lack of uniformity with which the Argentine claim has been envisaged at different times, entailing a resulting inclusion in, or exclusion from, that claim, of either or both of Nueva and Lennox Islands. As regards Picton, there are lines cutting right across it, not laterally but vertically —a configuration that could not possibly stem from any normal interpretation of the Islands clause of the 1881 Treaty. The same applies to other maps with lines cutting across Navarino or even its western neighbour, Hoste Island. (Details are given in later paragraphs.) In fact, so Chile alleges, there is only *one* Argentinean map *dating from the Treaty decade*[99] that shows a line of division conforming to the present Argentine claim to all three islands of the group.

(6) Most "third-country maps" support the Chilean claim. The comparatively small number that do not are of dubious value for the reasons stated in paragraph 161 below.

145. From the foregoing data the Court has derived the impression that as far as weight of cartography goes (and leaving particular maps for later consideration), the balance is very much in Chile's favour, and tends to confirm the conclusions already arrived at concerning the interpretation of the Treaty words "to the south of the Beagle Channel". This view finds further support from a consideration of the "time-frame" aspect, to which the Court now comes.

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[99] This was the map (Plate No. 23 to the Argentine Counter-Memorial) produced in 1889 for insertion in the Argentine Official Catalogue for the Paris World Exhibition of that year. Its reliability is open to question for reasons of the same order as those given in paragraph 149 below, and onwards. It should be compared with the map (Chilean Plate 28) that formed part of the Argentine Catalogue a few years earlier at the Bremen Geographical Society Exhibition of 1884, which showed the PNL group as Chilean, —and see also the last few lines of n. 118 *infra*.

(*e*) *Temporal considerations—the "time-frame"*

(i) *In general*

146. Although the relevance of this element can to some extent be more easily appreciated in connexion with certain particular maps to be discussed later, it will be convenient to say something in general about it first. The nature of the operative principle has already been stated in paragraph 142 (3) above. Since Chilean cartography has, from the start—that is from the year of the conclusion of the 1881 Treaty—consistently depicted the PNL group as Chilean, it is with reference to Argentinean cartography that the question mainly arises.

147. However, before proceeding further, it should be mentioned in parenthesis that the Court sees little point in enlarging upon its earlier discussion of that part of the pre-1881 cartography that consists of the maps drawn up by, or based upon those of the early explorers[100]. The reasons for this have already been indicated in the section dealing with the Chilean attribution under the Islands clause of the Treaty (especially in paragraphs 88 and 90 *supra*). The utility of the cartography of a case lies in the evidence it affords as to what those who produced, authorized, sponsored, published or disseminated it, regarded as constituting a correct representation of the territorial settlement concerned. Cartography appearing before 1881 cannot do this, although some of it might contain pointers—(see paragraph 162 below). The minds of the early explorers in particular, in drawing up their charts (and the same applies to later charts based on these) cannot have been directed to a treaty settlement which they could not anticipate, —still less to the negotiating and political factors that might enter into the drafting of it. They necessarily based themselves on purely geographical considerations, and the Court has already (*supra*, paragraphs 84-86) stated why it does not think such considerations to be in themselves determinant for resolving the problem of the "Treaty" issue of the Beagle Channel. That geographical elements, *inter alia*, were present to the minds of the negotiators, the Court does not doubt (*supra*, paragraphs 50 and 51, 93-94 and 98 (*b*)). But it is not possible to know with any certainty what maps or charts they made use of; while those that may be presumed to have been available to them gave no conclusive indication as to which of the Channel's arms was to be seen as the major one. In consequence, just as it was in the Treaty itself that the Court had to find a solution, it is only from just before or near the date of the Treaty that cartography becomes definitely relevant for elucidating or confirming its correct interpretation.

(ii) *The 1881-1887/8 period*

148. There can be no doubt that in the immediate post-Treaty period, that is to say from 1881 to at least 1887/88, Argentine cartogra-

[100] Quite different is the case of certain maps (see paragraph 162 *infra*) of the period 1876-1881, that were closely connected with the emergence of the 1881 Treaty.

phy in general[101] showed the PNL group as Chilean; and this was true of the cartography that, for the reasons given in paragraph 138 above, has to be regarded as having an official character, or at least aspect, such as the 1882 Latzina map already considered (paragraphs 126-128), and also the 1886 map of the Argentine Geographical Institute, reproduced in Chilean Plate No. 34 (*supra*, paragraph 65 (*e*)), both showing the PNL group as Chilean. Another and rather striking example is afforded by the map published in 1888 by the Argentine Bureau of Information in London (Chilean Plate No. 38) which actually corrected a similar publication of 1887 (shown on the same Plate) that had depicted a completely fanciful line of division that could have no possible warrant under the 1881 Treaty[102]. Another Argentine map of the period to which, though not actually official, the Court thinks a special degree of credence can be attached on account of the high standing of its authors, is the "Moreno-Olazcoaga" map of 1886, reproduced in Chilean Plate No. 35, which shows the boundary line unequivocally as passing along the northern arm of the Beagle Channel. Dr. Moreno was a boundary expert whose qualifications have already been mentioned—(*supra*, paragraph 135, and see further paragraph 158 below)[103]. Lt. Colonel Olazcoaga was the author of the book that had been given by Señor García, Argentine Minister in London, to Lord Tenterden, Under-Secretary at the Foreign Office, in October 1881 (*supra*, paragraph 119); and he was, or became, the Chief of the Military Printing Office of the Argentine Army.

149. *The "Paz Soldan" maps*—These fall into two periods:

(*a*) *1885*—Argentina contends that there was at least one important exception to the alleged quasi-uniformity of Argentine cartography during this period. This exception is said to be constituted by what is known as the "Paz Soldan" map of 1885 edited by Carlos Beyer (Argentine Plate No. 17 to the Counter-Memorial, and Chilean Plate No. 176).

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[101] One private map of the period, published in 1888, the "Estrada" map (Chilean Plate No. 39), which attributes by means of colouring, and is regarded by Chile as showing the PNL group as Chilean (see the Chilean volume of "Some Remarks, concerning the cartographical Evidence", at p. 37) has its colouring so equivocally shaded that it could be taken to depict the group as Argentine. But in any case the benefit of the doubt must go to Chile since a second Estrada map published in the same year quite clearly shows the group as Chilean. Another Estrada map of 1887 must be discounted for reasons similar to those given in nn. 102 and 105 below, while one of 1889 shows the group as Chilean; —both these are on Chilean Plate 44.

[102] This, in two respects: (i) since under the first part of Article III of the Treaty, the perpendicular in the Isla Grande of Tierra del Fuego, from Cape Espíritu Santo to the Beagle Channel, was deliberately stopped there, a map showing a line of division which, by prolonging the perpendicular, *crossed* the Channel, and proceeded southward through the Murray Sound and past the Wollaston group, could not possibly represent the division contemplated by the Treaty; (ii) this map, thereby, and equally by colouring, showed, not only the PNL group, but also Navarino Island and the Hermite group, as Argentine. But these localities were "to the south of the Beagle Channel" according to any possible interpretation of that phrase in the Chilean attribution under the Islands clause of the Treaty.

[103] The later maps (1901-2) issued under Dr. Moreno's name, showing only Lennox Island as Chilean, but Picton and Nueva as Argentine, and repudiated by him in this respect, are commented on in paragraph 158 below.

It was not actually an official publication, though to be regarded in a special light on account of the reputation of its author[104]. But this map, equally, showed a fanciful line unrelated to the Treaty basis of division, —see footnote 105 below. Consequently, it has to be discounted as not amounting to any real break in the general uniformity of relevant Argentine maps of the 1881-1887/8 period, and provides no real exception to that.

(*b*) *1887-1890 (the "Lajouane" versions)*—After Señor Paz Soldan's death in 1886, four more maps based, or purporting to be based, on his cartography, were published in 1887 (two), 1888 and 1890, not (as in 1885) under the editorship of Carlos Beyer, but of Felix Lajouane. Both those of 1887 (Chilean Plates 36 and 37), unlike the maps of 1885, show the PNL group as Chilean. But those of 1888 and 1890 (Argentine Counter-Memorial Plates 21 and 26), show them as Argentine, with a line of division down the southern arm of the Beagle Channel between Navarino and Picton/Lennox, and going on to Cape Horn in such a way as to leave part of the Wollaston group east of it. Two volte-faces of this kind within one five-year period—for which no explanation seems to have been offered—must throw doubt on the credibility of the whole series of Paz Soldan based maps. It also raises the question of the reason for it. To that, the considerations mentioned in sub-section (v) below may be material.

150. Thus, if concordance is the test, there was, in what the Court regards as the critical period of six to eight years following upon the conclusion of the Treaty of 1881, before any queries or controversies had arisen, a virtually complete concordance of Argentine-Chilean cartography in respect of all maps that do not have to be discounted as portraying a line of division that could not on any possible interpretation of the relevant Treaty provisions, be that contemplated by them.

(iii) *The post 1881-1887/8 period*

151. Chile has contended[106] that the quasi-uniformity of Argentinean cartography in the inmediate post-Treaty period, and its concordance with Chilean official cartography in the sense that PNL group was Chilean, continued on the basis, not of a complete, but of a "substantial" concordance of official Argentine maps up to 1908, apart from certain "doubtful exceptions". By 1908, the existence of a latent controversy about the group had become evident, and in 1908 the official

[104] Señor M. F. Paz Soldan was a highly reputed Peruvian geographer, publishing in Buenos Aires at this time.

[105] Exactly the same observations as are made in n. 102 above apply in this case also, but even more strongly, since the Isla Grande perpendicular was prolonged across the Channel to cut through Hoste Island, both in its northern part and through Peninsula Hardy; after which it went on to Diego Ramirez Island and then to Antarctica, leaving to Argentine everything east of it, —that is to say not merely east of the Cape Horn meridian but west of a meridian west of that at (approximately) 68°60′.

[106] See for instance the Chilean written Reply, p. 356, paragraph 175.

Argentine map that figures as Argentine Counter-Memorial Plate No. 57 was published[107]. This did not actually depict the three islands—or only the beginning of Picton—but it traced a line in the Beagle Channel which, before it was cut off by the map edge, adumbrated the turn towards the south between Navarino and Picton Islands. This was followed up in 1909 by a map published by the Meteorological Office of Buenos Aires showing the PNL group, by colouring, as being Argentine[108]. Maps to the same effect were published by the Argentine Ministry of Agriculture in 1910 and 1911[109]. There can therefore be no doubt about the Argentine official position, cartographically speaking, from this period on, —but it was inconsistent with that manifested in the post-Treaty period, which the Court holds to have the superior probative value.

152. The instances characterized by Chile as "doubtful exceptions" to the general rule of substantial Argentine cartographical conformity in depicting the PNL group as Chilean (see paragraph 151), were (*a*) the "London Argentine Bureau of Information map" of 1887 (Chilean Plate No. 38), already commented on in paragraph 148 above as showing a merely fanciful line of division unrelated to the provisions of the 1881 Treaty, and in any case corrected by the same Bureau on its map of the next year (also on Chilean Plate 38); (*b*) the so-called "Zeballos map" that was included as part of the Argentine case against Brazil in the *Territorio de Misiones* Arbitration, 1893-4, of which there were two versions, both shown on Chilean Plate 64, and both, either by line or colouring, exhibiting a basis of division that, for the reasons given in footnotes 102 and 105 above, could not be derived from any possible interpretation of the 1881 Treaty; and finally (*c*) "Map XIV, 1901", attached to the Argentine evidence in the (Andes) Boundary Arbitration of 1898-1902 (Chilean Plate No. 84, and Argentine Counter-Memorial Plates 42 and 44), —showing, not indeed (like the other two) a line wholly underivable from the Treaty, but one that claimed Picton and Nueva Islands, while leaving Lennox Island to Chile. Of these three "exceptions" to the general situation of Argentine quasi-uniformity, the first two must therefore be discounted, and the third, while not to be discounted, appears to be an isolated instance, and in any event occurred twenty years after the conclusion of the Treaty.

(iv) *The same—The "Pelliza" map*

153. Argentina has, however, claimed that another map, known in the case as the "Pelliza map", published in 1888 (Argentine Counter-Memorial Plate No. 19), was

> the first depiction officially *recognized* [stress added] by the Argentine Government of the Argentine-Chile boundary line; the first that may be considered as *an official graphic representation of the "Boundary Treaty"*—[stress in the original][110].

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[107] Published by the Argentine Office of International Boundaries as one of the Annexes to the book "La Frontera Argentino-Chilena, Demarcación General".

[108] Argentine Counter-Memorial Plate No. 58.

[109] *Ibid.*, Nos. 61 and 62.

[110] Argentine Counter-Memorial, paragraph 23, p. 231.

The ground of this claim is that the map in question was published by Señor M. Pelliza, Argentine Under-Secretary for Foreign Affairs at the time, as part of a book by him entitled "Manual del Imigrante en la República Argentina", which was adopted as an official publication. However, before commenting on the claim thus made, the Court will refer to the physical characteristics of this map.

154. The map shows a line that starts to run along the north shore of the northern arm of the Beagle Channel, along the Isla Grande coast opposite Picton Island, but then, when over against what is roughly the mid-point of Picton, facing, say, Isla Gardiner, turns abruptly at right angles, crosses the Channel, crosses Picton Island which it cuts in two, and, on the other side of it joins the southern arm of the Channel off Lennox Island and passes on between the latter and Navarino, —thus attributing to Argentina, Lennox and Nueva Islands and the south-eastern end of Picton, and to Chile the other, north-western, end of Picton. This result, even if not absolutely underivable from any possible interpretation of the Treaty, is so eccentric that it can hardly be taken seriously; it would entail that the Treaty concept of the Beagle Channel should be that of a waterway which, after proceeding some distance along the northern arm, breaks off, and resumes overland with the lower end of the southern arm. This is explained by Argentina as a printing error, but other versions of the map show the same configuration, and in some of them (Chilean Plate No. 179, and Argentine "Additional Charts and Maps", Nos. 4-7) there are variations, —the line appears to follow, not the south shore of the Isla Grande but the north shore of Navarino Island, —then to cross over to the northern arm of the Channel—or else to Picton itself—but in any case to divide Picton and afterwards proceed by the southern arm past Lennox Island. The Court is obliged to conclude therefore that the Pelliza map is of too uncertain a character to have the requisite probative value, —and the same must apply to another map specifically cited by Argentina that clearly belongs to the same complex as the Pelliza map, namely the "Lajouane" map of 1890 (Argentine Counter-Memorial Plate No. 27), which shows similar features, —in this case, making the Isla Grande perpendicular cross the Beagle Channel and then proceed along the north shore of Hoste and Navarino Islands, cutting Picton Island in two.

155. On the other hand, the Court does not think it necessary to pronounce on the Chilean claim that the Pelliza map was not of Señor Pelliza's own making at all, but was a copy of the later series of Lajouane maps already noticed (paragraph 149 (*b*)). The real point is that, whatever the origins of the map, it is claimed to have been officially *adopted* and moreover recognized by Argentina as correctly representing the boundary-line. If so however, it was in complete contradiction with the 1882 Latzina map published six years earlier, also in the context of immigration (*supra*, paragraphs 126-128). Argentina now maintains that the Latzina map had no official character and that it was the Pelliza map which was the first to accord with Argentine Government opinion: but the Court has already given its reasons for regarding

the first (1882) Latzina map as reflecting the views both of the President of Argentina, and of Señor Irigoyen, the chief Argentine negotiator of the 1881 Treaty, and as doing so not only at the time of the conclusion of the Treaty but also the year after, when, as Minister of the Interior, Señor Irigoyen officially sponsored the map and caused its widespread dissemination abroad as part of a government campaign to promote European immigration into Argentina. The Pelliza map of 1888 could therefore only have represented, not an original view, but a change of view, for which there could be no convincing explanation since nothing else had changed in the meantime, and nothing was known in 1888 concerning the Treaty that was not equally, if not better, known in 1881-1882. This however brings the Court to a phenomenon that, since it affects several maps or series of maps, must receive notice.

(v) *The Argentine change of policy in 1889, and the Decrees of 1891 and 1893*

156. By a Decree of 21 December 1891, the Argentine Government created an International Boundaries Office at the Ministry of Foreign Affairs. The Decree referred to the "deficiencies and inaccuracies which characterize the great majority of the geographical charts . . . at least on boundary areas", and added that State subsidies should only be interpreted as incentives for intellectual work[111]. The Decree of 1891 was followed in 1893 by another, providing that works on national geography already published should not be considered as officially approved unless accompanied by a "special statement" from the Department of Foreign Affairs[112]. This Decree made, and also elucidated, the same point as the earlier one, reciting that, in the case of many publications, these had been

> promoted by means af official acts, either taking them for the purpose of teaching or propaganda, or aiding them through subsidies granted by public decrees of the Nation, which could give them, at least outwardly, an extensive importance which, in fact, they cannot have as a result of these acts.[113]

But these preoccupations had already existed for some time previously, having (as the Decree of 1891 recited) given rise to the

> note of 2 November 1889, in which this Ministry [of Foreign Affairs] conveyed to the Ministry of Justice, Worship and Education, the decision of the President of the Republic to deny any official character of [*i.e.* to] those charts and maps . . .[114]

In consequence of these Decrees, and of the policy underlying them, it was obvious that it would thereafter be impossible to publish as having any kind of official character or approval (and sometimes not easy to publish at all), maps not endorsed with the *imprimatur* of the Argentine

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[111] Annex 57 to the Argentine Counter-Memorial, p. 197. It may be that this admonition was intended to convey disapproval over the State support given to the Latzina map of 1882, which both President Roca and Señor Irigoyen approved, and which seems to the Court tellingly significant in determining what was *then* officially regarded as the Treaty boundary line.

[112] Annex 58 to the same, p. 202.

[113] *Ibid.*, p. 201.

[114] *Loc. cit.* in n. 112.

Foreign Ministry, which would presumably not be given unless the map corresponded to the official view. This may be the explanation of what would otherwise be the inexplicable process by which authors of certain Argentine maps, already published and showing the PNL group as Chilean, brought out, or became associated with, later editions that, without indicating any reason for the change, showed the group as Argentinean. Some examples of this will now be given[115].

157. *The later "Latzina" maps*—The following points call for notice:

(*a*) In 1888, Dr. F. Latzina who, when Director of the Argentine National Statistics Board, had published the "Latzina map" of 1882, as part of the work referred to in paragraph 126 *supra* (showing the PNL group as Chilean), published another map as part of a new work entitled "Geográfia de la República Argentina", which equally showed the group as Chilean (Chilean Plate No. 48, —map on the left). This work obtained the "Rivadavia Award" of the Argentine Geographic Institute; and a large number of copies of it where ordered by the Argentine authorities for distribution in Europe and elsewhere. This makes it even more difficult than it already was to account for the official Argentine adoption, apparently in the very same year, of the Pelliza map of 1888, as described above in paragraphs 153-155, and diminishes yet further the credibility of the latter map. Even more unaccountable was the re-issue, only two years later in 1890, of Dr. Latzina's "Geográfia" in a French edition, said to be an "enlarged and corrected" one, but this time with a map (Chilean Plate No. 48, —the map on the right) that was not the Latzina map of the previous (1888) edition and, to all intents and purposes, was the Pelliza map of that year with the same eccentric line cutting Picton Island in two (*supra*, paragraph 154), and showing Nueva and Lennox Islands as Argentine. No explanation of this change was given. Adding to this confusion, in between the dates of these two Latzina editions of 1888 and 1890, there was published a "Carte de la République Argentine" (Plate 25 to the Argentine Counter-Memorial) as part of a work entitled "L'Agriculture et l'Elevage dans la République Argentine", officially sponsored for the purposes of the Argentine participation in the Paris World Exhibition of 1889. This "Carte" shows yet a third variation of the Pelliza line (for the others, see paragraph 154 *supra*) with a line along mid Beagle Channel as far as Picton Island which, this time, it seems just to fail to cut, and then down by the southern arm. According to Chile, Dr. Latzina was not the author of the publication of which this map was part; but he did write an introduction to it, in which he thanked a certain Dr. José Chavanne for "his generous help in the drawing of the maps", from which it would seem to follow that the latter favoured the Pelliza alignment. Yet in 1890 (*i.e.* the very next year) Dr. Chavanne published his own map entitled "Mapa Físico

[115] In a sense the Pelliza map, which Argentina now wishes to substitute for the Latzina map as an expression of the then official Argentine view (though, as the Court thinks, without convincing effect), is itself an example of this; —but it was of course the act of the Argentine Government, not of a private party.

de la República Argentina" which, as can be seen from its reproduction on Chilean Plate No. 50, indicated the PNL group as Chilean. For such changes and variations, within so short a period, in maps all purporting to illustrate the effect of the same Treaty, which had not itself changed at all, there cannot have been any objective reason, and the conclusion seems warranted that these were due to some sort of extraneous cause, stemming perhaps from the change in official Argentine policy that began in 1889, as described in paragraph 156 above.

(*b*) In the particular case of the 1889 "Carte" (see above) there was another possible explanation of what the map showed, which the Court has noted. In the work of which this map was a part[116], the version there given of the Argentine attribution in the Islands clause of the 1881 Treaty, was seriously incorrect. It was as follows:

> . . . appartiendront à la République Argentine : l'île de los Estados, les îlots qui l'entourent et les autres *îles de l'Atlantique au sud de la Terre de Feu* et des côtes orientales de la Patagonie . . . [stress added].
>
> . . . to the Argentine Republic shall belong Staten Island, the islets that surround it, and the other *Atlantic islands to the south of Tierra del Fuego* and of the eastern coasts of Patagonia [stress added].

The notion of islands "south" of the "eastern" coasts of Patagonia is scarcely realistic, while the category referred to of Atlantic islands south of Tierra del Fuego (which must here denote the Isla Grande), is not specified anywhere in the Islands clause of the Treaty. It does however correspond closely to the interpretation of the expression "to the east of Tierra del Fuego" that Argentina has been contending for in the present proceedings, —namely that this should be regarded as comprising all the islands fringing the eastern side of the archipelago down to Cape Horn (see opening of paragraph 60 *supra*), —with the implications described in paragraphs 60 (2) and 62 (*c*). Be that as it may, the error of description contained in the work under discussion ("L'Agriculture et l'Elevage", etc.) would both fully account for the way the "Carte" attached to it was drawn, and also entirely deprive it (and, by association, other maps of "Pelliza" genus or derivation) of all probative value.

(*c*) The Chilean written Reply states (p. 365) that in the same work of which the "Carte" was a part, there were three other maps that all showed the PNL group as *Chilean*, one of them actually carrying the appellation "Canal Beagle" in such a way as to indicate the northern arm, between Picton/Nueva and the south shore of the Isla Grande. The latter observation is correct, —but these maps (as reproduced in Chilean Plate No. 181) are on an exceedingly small scale, and if viewed through a powerful magnifying glass appear, by colouring, to attribute the PNL group to Argentina, not Chile, in the same way as the "Carte" does by line. In the result, one of these maps—the one indicating the northern arm as being the "Canal Beagle"—shows the PNL group both as being

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[116] *I.e.* as indicated in sub-paragraph (*a*) above, "L'Agriculture et l'Elevage dans la République" sponsored by the Argentine authorities for the purposes of the Paris World Exhibition of 1899.

south of the Channel, and yet as being Argentinean. The fact that Argentina invokes the work in which this map appears, lends colour to the surmise (see previous subparagraph) that for Argentina, the consideration that must prevail in determining whether a given island comes within her attribution under the 1881 Treaty is that of presence "on the Atlantic" (see paragraph 60 (3)), —a view which the Court has been unable to accept, and which has caused Argentina to put forward the strained interpretation of the expression "to the east of Tierra del Fuego" which the Court has characterized as such in paragraph 65 (*a*) above.

(*d*) In connexion with the point just discussed, the Court has compared the two maps reproduced as Chilean Plates Nos. 34 and 63 —of which the first has already twice been commented upon above, in paragraphs 65 (*e*) and 148. Both were of quasi-official character, being made and published ("construido y publicado") by the Instituto Geográfico Argentino "under the auspices of the Honourable National Government". Both are entitled "Gobernación [Governorate] de la Tierra del Fuego y de las islas Malvinas"; but whereas the first, published in 1886, shows the PNL group as Chilean, the second, published in 1893, shows only Lennox Island as Chilean, and Picton and Nueva as Argentinean[117]. It is however another difference that is of interest in the immediate present connection, namely that the ocean south of Tierra del Fuego and of the archipelago which, in the 1886 map was, as already noticed (paragraph 65 (*e*)), called the "Océano Antártico", became split into two in the 1893 map, the part west of Cape Horn and the Wollaston group being called "Océano Pacífico", whereas that east of the Cape, between the Wollastons and Staten Island, is called "Océano Argentino"[118]. At the same time the Wollaston group on this map is shown as Chilean, unlike that of the previous year (1892) described in footnote 117 hereto. Consequently—and see also footnote 118—it becomes difficult to avoid the impression of a confusion and inconsistency in Argentine cartography at this time, so great as to deprive it of real evidential force.

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[117] Yet in a map (also reproduced on Chilean Plate 63) dated the previous year (1892), published by the same Institute and under the same auspices, and apparently part of the same Atlas, not only are all three islands of the group shown as Argentine, but so equally is the whole Wollaston group.

[118] This map is clearly copied from the "Popper" map of 1891 (Chilean Plate 55) where the words "Mar Argentino" appear, and which divides the group by the same line (that has come to be known as the "Popper line") passing between Navarino and Picton, but then between Lennox and Nueva. The "Popper" map was drawn up to illustrate a lecture given by the Roumanian geographer and explorer, Julio Popper, to the Argentine Geographical Institute and published by the latter. It contains a number of unusual features, and was a good deal copied. No reason for the particular line of division shown seems to have been given, and in his despatch to Lord Salisbury at the Foreign Office, dated 10 April 1892 (Chilean Annex No. 60 (9)), enclosing a copy of the "Popper map", the British Minister in Buenos Aires drew specific attention to the difference between it and the map of the Argentine Geographical Institute of a few years earlier (Chilean Plate 34 —see paragraphs 65 (*e*), 148 and 157 (*d*) above) which showed the whole PNL group as Chilean—(see also n. 99 *supra*).

158. *The "Moreno" maps*—The map published by Dr. F. P. Moreno in 1886 together with Lt. Colonel Olazcoaga (Chilean Plate No. 35), and showing the PNL group as Chilean, has been described earlier (paragraph 148). Three other maps, published later and attributed to Dr. Moreno, are reproduced on Chilean Plate No. 118, and one of them appears as Argentine Counter-Memorial Plate No. 43. The first of these later maps was published in 1889 under the *aegis* of the Royal Geographical Society, London, as being "from a survey under the direction of Dr. Francisco P. Moreno". Neither by line nor by colouring does it show any attribution at all for the group. The remaining two—which are in fact one and the same map—appeared in the 1901 and 1903 editions of a work published in Paris, the "Annales de Géographie" by MM. de la Blache, Gallois and de Margerie. This is clearly taken straight from the "Popper" map of ten years earlier and shows the "Popper line"—see footnote 118 below. It is this map, showing Picton and Nueva Islands as Argentine, that appears as Argentine Counter-Memorial Plate No. 43, there entitled "Map by F. P. Moreno published in the 'Annales de Géographie, Paris, 1901". Commenting on these various maps in his Beagle Channel Memorandum of 17 July 1918[119], Señor Moreno confirms that the one he drew up in 1889 shows no attribution for the PNL group:

> In the map attached to the text of the lecture which I gave before the Royal Geographical Society in London on the 29th of May 1889, I only indicated the line from north to south—[*i.e.* the Isla Grande perpendicular from Cape Espíritu Santo to the Beagle].

But as regards the 1901 and 1903 maps "which maps bear my name" —and speaking of the fact that "the boundary line as there marked includes the islands of Picton and Nueva in Argentine territory", he says he "must here declare" that

> the demarcation was made by the Argentine Legation in London contrary to my opinion. I had to consent to it so as not to increase further the many difficulties I experienced during the whole of my stay there . . .

Whether these allegations were or were not justified, is not the question, and the Court does not rely upon them: the point is simply that Dr. Moreno repudiated the maps of 1901 and 1903 bearing his name, as not correctly representing his opinion on the subject of the title to the PNL group, which elsewhere in this Memorandum he very definitely stated to be (in his view) Chilean—(pp. 287-288 of the Chilean Annex No. 113).

159. *The "Hoskold" maps*—These maps, one of which is considerably relied upon by Argentina, provide another example of a series that goes through a sort of process of metamorphosis:

(*a*) Señor A. D. Hoskold was a mining engineer of repute in Argentina who became Director of the Argentine National Department of Mines and Geology, and Inspector General of Mines. His first map (see

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[119] Chilean Annex 113. This was written in response to a request from the British Minister in Buenos Aires, Sir Reginald Tower, at a time when the possibility of the Beagle Channel question being referred to the Britisth Government for arbitration was being invoked.

Chilean Plate No. 61) appeared in 1892, in illustration of a paper entitled "Mines in the Argentine Republic" which he read in that year at the Newcastle (England) session of the Institute of Mining and Mechanical Engineers. It shows the PNL group as Chilean, —and since neither the occasion, nor the map itself, had any sort of official character, it can be taken as undoubtedly representing his own individual personal view. Yet two years later—in 1894—he published—this time under the official seal of the International Boundaries Office of the Argentine Ministry of Foreign Affairs (see paragraph 156 above)—another map, entitled "Mapa Topográfico de la República Argentina" which now showed the group as Argentinean. This map also is on Chilean Plate No. 61, and on Plate No. 22 to the Argentine Memorial. The seal of the Boundaries Office can plainly be seen on the cover, and the legend not only records this, but bestows high praise upon the map. There can therefore be no question but that, if not technically an official map, it had full official approval and reflected the official view as existing at that time. Yet, as has already been mentioned, that view had come to differ completely from the one that had been manifested for some seven or eight years in the immediate post-1881 Treaty period, and is consequently open to the same type of criticism as that made in paragraphs 150, 151 and 155 above. The Hoskold map of 1894 carries a further statement to the effect that it has been "drawn on the basis of the most recent data", but no indication is given, either there or anywhere else, of what recent data it was that had caused islands represented as Chilean in one year, to be represented as Argentinean two years later—(indeed, possibly only one year later—see next sub-paragraph). In the interval, neither the text of the Treaty nor the geography of the area had altered.

(*b*) The original of the 1894 Hoskold map seems to have appeared in 1893, when it won the first prize at the Chicago Fair of that year —(this is stated on the 1894 map cover). This original (1893) edition is reproduced as Argentine Counter-Memorial Plate No. 31. It is supposed to represent the PNL group by colouring as being Argentinean[120], but even with the aid of a powerful magnifying glass the Court has not been able to detect a sufficient differentiation in the colouring to enable it to be seen what the attribution is. If this is correct, then the Hoskold maps exemplify the same process as the Moreno maps, of starting by showing the group as Chilean, proceeding to neutrality (no attribution shown) and ending, after they have come under official influence, as showing it as Argentinean. If, however, the attribution on the 1893 Hoskold map is indeed Argentinean, then, as already mentioned, Señor Hoskold must have changed his mind from one year to another, on the basis of undisclosed data. In any case, the attribution was definitely Argentinean in the 1894 map. The only clue afforded appears to be a statement in one of Señor Hoskold's later writings[121] to the effect that the "first proof" (of this 1893-4 map) "merited the highest award at the Chicago Fair of 1893,

[120] This is stated by both Parties.

[121] See the Chilean volume entitled "Some Remarks Concerning the Cartographical Evidence", p. 49, and no. 40 on p. 85.

and since then has been corrected on two occasions by the Boundary Office of the Ministry for Foreign Affairs," —but there is no indication as to what these particular corrections related to. On the other hand there is at least some evidence from the later writings[122] to suggest that Señor Hoskold had not changed his former personal view on the basis of which his first map of 1892 attributed the PNL group to Chile.

(*c*) A further peculiarity of the 1893-1895 Hoskold maps is the appearance of the words "límite a fijar" ("boundary to be fixed") in the sea, off the south point of Lennox Island. Since no boundary line at all is shown (the attribution being by colouring) the meaning of this is obscure, unless it foreshadowed an intention to introduce into later editions a line tending towards Cape Horn. But, in the circumstances, such an intention can hardly be ascribed to Señor Hoskold personnally.

160. *The 1903 "Delachaux" map*—This map (Argentine Counter-Memorial Plate No. 47), the last of the eight maps of Argentinean origin to be specifically cited by Argentina (paragraph 139 *supra*), went through something of the same process as the others noted above. Appearing in 1903, it showed the PNL group as Argentine. Yet nine years earlier, in 1894, Señor Delachaux[123] had published a map showing the group as Chilean. The explanation of this change proffered by Argentina (Counter-Memorial, p. 525) in that the earlier map was produced under the influence of (erroneous) Chilean cartography, but that this was "corrected . . . on the [1903] map . . . which was based, as stated in its legend, on 'official [*i.e.* Argentine official] documentation' ". If this is so, then it would seem that neither map constituted an independent expression of Señor Delachaux's views, unaffected by external considerations, and that there is no ground upon which the Court could rely upon the one more than the other.

161. *The "third-country" maps* (see paragraphs 142 (*b*) and 144 (6) above)—In addition to the eight Argentine maps specifically cited by Argentina (paragraph 139), all of which have now been considered, she also cites (*ibid.*) twelve produced in countries neither Argentine nor Chilean. These are shown, as Argentine Counter-Memorial Plates Nos. 13-15, 18, 22, 28-30, 34 and 35, and Plates Nos. 3 and 9 of the Argentine volume of Additional Charts and Maps. The Court has examined these maps, with the following result. All of them, with two seeming exceptions[124], attribute the PNL group to Argentina. Six (or—if one of the seeming exceptions is counted—seven) show an attribution—either by

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[122] See Chilean written Reply, paragraph 159, pp. 350-351.

[123] Señor Enrique Delachaux was a distinguished Argentine engineer and geographer, head of the cartographic section of the Argentine Museo de la Plata, and associated with the Argentine-Chilean Boundary Commission (1881 Treaty, Article IV); but the Court has no information as to the dates or periods involved.

[124] One of these, a Russian map (Plate 3 in the Argentine Additional Charts and Maps), attributes Navarino Island to Argentina but appears to attribute the PNL group to Chile. However, the colouring is so ambiguous that no certainty is possible. The same applies in the case of Plate 14 to the Argentine Counter-Memorial; but assuming that an

line or by colouring—that could not be derived from the 1881 Treaty inasmuch as they show Navarino Island (unquestionably south of the Beagle Channel) as Argentine; and seven also show the Hermite group, west of Cape Horn, and no less unquestionably south of the Beagle Channel, as Argentine. Two of these moreover show a line that crosses the Channel at Point X and proceeds on down through the Murray Channel, leaving all to the east of it to Argentina. The remaining four show a line passing between Navarino Island and Picton/Lennox Islands, which however then goes on to cut through the Wollaston group (Cape Horn). Consequently, a question mark has to be placed against virtually all of these maps. Most of them show attributions that are not derivable from the 1881 Treaty at all, and are therefore open to the criticisms made earlier in paragraphs 148-155 and related footnotes, in respect of various Argentine maps, of which some of them appear to be copies. In such circumstances the fact that a map shows an Argentinean attribution for the PNL group is of small probative value.

(f) Conclusion on cartography

162. The conclusion the Court reaches is that Argentine cartography, viewed as a whole, does not support the present Argentine contentions, or is subject to too many doubts, queries and inconsistencies to do so effectively, —while much of it supports the Chilean position. In marked contrast is the cartography of Chile[125]. Even the only Argentine map of the inmediate *pre*-1881 Treaty period, that was indubitably an "official" one, favours Chile. This was the "Elizalde" map of 1878 (Chilean Plate No. 9), sent by the then Argentine Foreign Minister, Señor Rufino de Elizalde[126], to the Chilean Minister in Buenos Aires, and chief negotiator for Chile, Señor Barros Arana, on 30 March 1878. It proposed an entirely different boundary line for the Magellanic region and in the Isla Grande of Tierra del Fuego. But once it had reached the Beagle Channel, at a point approximately where the later Ushuaia was to be, and only a small way east of the eventual Point X of the 1881 Treaty (see map B hereto), it proceeded along the Channel and out into

attribution can be detected on it, this is said on page 504 of that Counter-Memorial to be one that gives the PNL group to Argentina but leaves Navarino uncoloured, "as not being awarded to either Party". Yet this Island is unquestionably south of the Beagle Channel (part of its south shore in fact) and therefore Chilean under the 1881 Treaty.

[125] In addition to the remarks on Chilean cartography contemporaneous to 1881 already made (*supra*, paragraphs 131-133), attention may be drawn especially to four maps closely connected with the negotiating period of the 1881 Treaty, —namely the map (Chilean Plates 8 and 169) stated by Chile to have been sent to Santiago by Señor Barros Arana in 1876 in illustration of the "Bases" of that year—see paragraphs 25 and 34 *supra*; the first sketch of Baron d'Avril, French Minister in Santiago, of 1877 (Chilean Plates 12A and 170); the Barros Arana sketch map of 1878 (Chilean Plate 10), and the El Mercurio Map of 1878 representing the terms of the Fierra-Sarratea Treaty of that year (Chilean Plate 11). These maps and sketches uniformly depict the PNL group as Chilean. Argentina has registered objections to their probative value, both in general and in particular, and the Court mentions this without further comment.

[126] He had replaced Señor Irigoyen, who had been Foreign Minister when the negotiations for the Treaty were at the 1876 stage, and who returned for the later stages, ending in 1881.

the ocean by the northern arm, leaving the whole PNL group south of it, on the Chilean side.

163. Finally, the Court wishes to stress again that its conclusion to the effect that the PNL group is Chilean according to the 1881 Treaty has been reached on the basis of its interpretation of the Treaty, especially as set forth in paragraphs 55-111 above, and independently of the cartography of the case which has been taken account of only for purposes of confirmation or corrobation. The same applies in respect of the particular maps discussed in, and from, paragraph 119 onwards.

3. *Acts of jurisdiction considered as confirmatory or corroborative evidence*

164. Chile has contended that her title to the PNL group, resulting, as she maintains (and as the Court has found) from a correct interpretation of the 1881 Treaty, is confirmed by numerous acts of jurisdiction in and relative to the three islands of the group—in manifestation of sovereignty over it—and to the total exclusion of any comparable acts on the part of Argentina. She has supplied the Court with a voluminous number of documents in support of this contention[127]. Argentina, on the other hand, has argued that in the circumstances of the present case, and as a matter of law, such acts have no probative value.

165. The Court does not consider it necessary to enter into a detailed discussion of the probative value of acts of jurisdiction in general. It will, however, indicate the reasons for holding that the Chilean acts of jurisdiction while in no sense a source of indepndent right, calling for express protest on the part of Argentina in order to avoid a consolidation of title, and while not creating any situation to which the doctrines of estoppel or preclusion would apply, yet tended to confirm the correctness of the Chilean interpretation of the Islands clause of the Treaty.

166. An analysis of the record reveals the following:

(*a*) Until 1892 there were no significant acts of jurisdiction specifically referable to the PNL group. This is explained by Chile on the ground that owing to the sparseness of the population and the character of the region, no exercise of authority on the islands was called for. Argentina has maintained that her presence in the Beagle Channel area was, during this period and even earlier, more conspicuous than that of Chile owing to the founding of Ushuaia in 1884; the assumption of authority in Staten Isand; the functioning of various scientific expeditions in the area; and the flow of water traffic which, while moderate, was predominantly in Argentine vessels. This is in keeping with Argentina's emphasis on the importance of "maritime" jurisdiction as a focus of enquiry. However, she does not claim at any time to have engaged in

[127] These documents, numbering 320 and running to 572 pages, are reproduced in chronological order from 1826 to 1971 in the Chilean Memorial, vol. III. Approximately two-thirds are devoted to the period 1881-1915, of which some 110 are prior to 1906.

any acts of jurisdiction or to have maintained any presence in the PNL group as such.

(*b*) Beginning in 1892, owing partly to the discovery of auriferous deposits on Lennox and Nueva Islands, and partly to a more positive attitude on the part of the Chilean authorities in Punta Arenas (Straits of Magellan), there began a series of administrative activities on the part of Chile. Thus in 1892 a decree fostering colonization was published in the Official Gazette of the Republic, and a sub-delegation was established on Lennox Island; in 1894 a system of land leases through public auction was inaugurated as a consequence of a law of 1893, also published in the Official Gazette; in 1896 a concession on Picton was granted to a British settler of distinction, Thomas Bridges; in 1905 a postal service was established. Indeed, in the period extending from 1892 through 1905, numerous official documents dealt with acts of jurisdiction in the three islands and many of them described the islands as lying south of the Beagle Channel.[128] Particularly revealing is the comprehensive Report of 1892 by Governor Señoret on the founding of Puerto Toro on Navarino Island opposite Picton, —a Report sent to the Chilean Minister for Foreign Affairs and equally published in the Official Gazette of the Republic of Chile. Motivated by the need to investigate the activities of the gold miners on Lennox Island, it contained a detailed description of various islands described as being south of the Beagle Channel, including the PNL group, and provided reasons for their colonization as part of the complex of southern islands which, without hesitation, were assumed to be Chilean (Chilean Memorial, vol. III, Document 28, p. 41). During the ensuing years Chile engaged in many other State activities, customarily associated with the existence of sovereignty, such as the provision of public medical services and education, the exercise of civil and criminal jurisdiction—etc.

(*c*) Chile contends, and the evidence appears to support the contention, that most of these activities (which were openly carried out) were well known to the Argentine authorities. Thus in the period between 1892-1898 the Argentine Governor at Ushuaia specifically and on several occasions drew the attention of the authorities in Buenos Aires to various Chilean acts on the islands, but without eliciting any positive reaction. According to Chile, at no time did Argentina register any reservation of rights, or initiate any protest, until 1915, and even this protest was limited to two of the three islands.

(*d*) Chile further fortifies her contentions by citing several Argentine official Decrees dealing with the Administrative Divisions of the Argentine National Territories, issued in the period between 1883 and 1904. None shows the PNL group as being under Argentine administrative control. This is all the more significant inasmuch as the Decrees indicate specific boundaries. The southern boundary of the department

[128] Chile has placed particular emphasis on the following documents dealing with this period: Chilean Memorial, vol. III, Documents 24, 25, 28, 64, 67, 86, 88, 102, 114 (*a*), 133, 152; Oral Proceedings, VR/5, p. 123.

of which Ushuaia is designated as the Capital is stated to be "Beagle Channel, boundary with Chile"—(Chilean Counter-Memorial, vol. II, Annex 368, pp. 131-132)—and see *supra*, paragraph 97 (iv). Likewise a critically significant quasi-official Argentine map appearing in 1886, dealing specifically with the "Governorate of Tierra del Fuego and the Malvinas", failed to depict any part of the PNL group as falling under Argentine governorship[129].

167. Cast against this background (and it could be filled in with other types of evidence) the Chilean legal position emerges. Stated succinctly it is that:

> In these circumstances the Argentine failure to protest for 34 years after the conclusion of the Treaty constituted an adoption or recognition of the allocation effected by its provisions.[130]

And after denying that Chile was relying on the concept of estoppel, it was explained that:

> The Chilean Government is relying upon the conduct of the Parties as a source of guidance in the interpretation of the Treaty. The subsequent conduct of the two Governments, confirms the Chilean interpretation of the Treaty, if it be the case that the textual approach is not considered to be conclusive.[131]

168. In keeping with her general emphasis on "maritime jurisdiction" Argentina, as previously stated, maintains that her presence in the whole area was more significant than that of Chile, —without however claiming that she exercised authority in any of the three islands. In general, she does not dispute the accuracy of the Chilean claim to have exercised such authority in the manner indicated earlier, although she asserts that many of the alleged concessions were merely paper claims. Her basic objections to the Chilean thesis rested rather more on legal than factual grounds. They are as follows, and the Court's views on them are given below in paragraph 169: —

(i) First and foremost Argentina invokes the express terms of the Vienna Convention, Article 31, paragraph 3 (*b*), which specifies that in interpreting a treaty

> There shall be taken into account, together with the context:
>
> (*b*) Any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation.

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[129] This map (shown on Chilean Plate 34 and Argentine Plate 18) has been cited earlier to illustrate different points—see *supra*, paragraphs 65 (*e*), 148, and 157 (*d*). Produced in 1885, it was published in 1886 in Buenos Aries in the Atlas of the Instituto Geográfico Argentino, "under the auspices of the Honourable National Government". That a similar map, similarly published under the same auspices some nine years later, and depicting the same Governorate (Chilean Plate 63), showed a "Popper" line (see n. 118 above), was merely an example of the same process as that described in paragraphs 156-160 *supra*. These two maps are commented on further in paragraph 157 (*d*); and see also n. 117.

[130] Oral Proceedings, VR/7, p. 23.

[131] Oral Proceedings, VR/7, p. 23.

The key word in this article, according to Argentina, is "agreement", and the Protocol of 1893 (see *supra*, paragraphs 73-78) is cited as a typical illustration of what was intended. She interprets the Convention as requiring a manifestation of the "common will" of the Parties and denies that the "unilateral acts" of Chile can be said to manifest any kind of agreed interpretation or common will. This being so, she asserts that the entire Chilean argument lacks relevance. Chile's answer to this line of reasoning takes the form of a simple denial of the meaning of the Vienna Convention advanced by Argentina. The concept of "agreement" in the clause cited does not require a formal "synallagmatic" transaction. It means consensus, and can be satisfied if "evidenced by the subsequent practice of the Parties which can only involve the acts, the conduct, of the Parties duly evaluated" (Oral Proceedings, VR/19, p. 184). The agreement, so Chile maintains, stems *from conduct*—in this instance from the open, persistent and undisturbed exercise of sovereignty by Chile over the islands, coupled with knowledge by Argentina and the latter's silence. In support of this conclusion, Chile points out that it would be quite inconceivable for a State to seek agreement in the exercise of its asserted sovereign rights. By their very nature such rights are unilateral and intended to be exclusive to the State performing them; —put concretely, a State does not ask another State's agreement to establish a postal service or to exercise civil and criminal jurisdiction.

(ii) Argentina's second argument is tied to the first and consists in a denial that any relevance can be attributed to Argentine silence. This silence can be put down to an attitude of reasonable and prudent restraint during a period of tension and cannot therefore be considered as evincing consent to Chile's acts, or agreement with the interpretation she seeks to place on them. To this Chile replies that Argentine "motives" are legally irrelevant, especially as her reticence and her failure to speak out on an issue as important as that of the exercise of sovereignty under a treaty is admitted to have been due to deliberate policy.

(iii) Finally, Argentina maintains that all non-agreed acts unilaterally performed by one Party are irrelevant when a boundary treaty provides for its own measures of demarcation. Until such measures are taken, there are zones of doubt and uncertainty and the other Party is on notice of this fact. She contends that the process of allocating sovereignty is not finished when the Treaty is signed and ratified. That would only be the first step, and therefore the activity or non-activity of a Party during the time when demarcation is pending is not "very useful evidence, —for the final, legally authoritative, meaning of the Treaty is still to be made known by the authority con-

stituted by both Parties for that very purpose" (Oral Proceedings, VR/13, p. 172).[132]

169. The Court's views on the above described Argentine arguments, briefly stated, are as follows:

(*a*) *Regarding paragraph 168, heads (i) and (ii)*, the Court cannot accept the contention that no subsequent conduct, including acts of jurisdiction, can have probative value as a subsidiary method of interpretation unless representing a formally stated or acknowledged "agreement" between the Parties. The terms of the Vienna Convention do not specify the ways in which "agreement" may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the Treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.

(*b*) *Regarding paragraph 168, head (iii)*, the Court equally cannot agree with the Argentine contention that merely because the Treaty provides procedures for demarcation on the ground, no subsequent conduct of the Parties, including acts of jurisdiction, can have any probative value. The purpose of such procedures is not to delay the allocation of sovereign rights over territories, which it is the very object of a boundary treaty to determine, but simply to make adjustment of such particular lines as may not be sufficiently clear from the necessarily general terms of the Treaty, —that is to say lines which can be adjusted in the light of purely local conditions without affecting the principles on the basis of which they were adopted. True, this may affect the application of the terms of the Treaty within an already allocated area, but this is a far cry from concluding that the Treaty itself is inoperative for as long as delays, tardiness or other circumstances hold up the demarcations, and that in the meantime it creates no capacity for either Party to act within the area it considers allocated to it[133].

170. Two further points are made by Argentina: (*a*) she asserts that through the publication of certain Argentine cartography, Chile was put on notice that Argentina did not agree with the Chilean interpretation of the Treaty (the maps referred to are the "Pelliza" map, those of Paz Soldan and the later "Latzina" and "Hoskold" maps—the Court's comments on these maps will be found in paragraphs 126-128, 149, 153,

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[132] The Argentine written Reply, paragraph 40 at pp. 215-216, contains a particularly trenchant summary of Argentina's position.

[133] These observations, although the Court has thought it desirable to make them, are really in the nature of *obiter dicta* since (see paragraph 78 *supra*) the 1881 Treaty makes no provision for any demarcation of the boundary in the Beagle Channel region, —a fact which tends to bear out the conclusion reached earlier (paragraphs 94ff.) that the negotiators were in no doubt as to what it was.

157 and 159 above); (*b*) Argentina argues further that as "soon as it was obvious that there was a difference of opinion between the two countries as to the proper interpretation of Article III . . . there took place the negotiations of 1904-05 with a view to its settlement" (Counter-Memorial, p. 411), —and while these negotiations failed, Argentina yet insists that they are significant as disclosing a lack of concurrence on the meaning of the Treaty.

171. The Court cannot accept the implications that Argentina seeks to derive from these two points. The mere publication of a number of maps of (as the Court has already shown) extremely dubious standing and value, could not—even if they nevertheless represented the official Argentine view—preclude or foreclose Chile from engaging in acts that would, correspondingly, demonstrate her own view of what were her rights under the 1881 Treaty, —nor could such publication of itself absolve Argentina from all further necessity for reaction in respect of those acts, if she considered them contrary to the Treaty. In the same way, negotiations for a settlement, that did not result in one, could hardly have any permanent effect. At the most they might temporarily have deprived the acts of the Parties of probative value in support of their respective interpretations of the Treaty, insofar as these acts were performed during the progress of the negotiations. The matter cannot be put higher than that.

172. The important point throughout is not whether Argentina was under a duty to protest against Chilean acts in order to avoid the loss of the islands because of unilateral acts performed outside the terms of the Treaty (which obviously could only be devoid of legal effect): the important point is that her continued failure to react to acts openly performed, ostensibly *by virtue* of the Treaty, tended to give some support to that interpretation of it which alone could justify such acts.

173. An additional argument needs to be considered, based on Article VI of the Treaty—(for text see paragraph 15 above). It has been suggested that this Article strips all confirmatory evidence, whether in the form of cartography or acts of jurisdiction, of any probative value. Article VI of the Treaty, commented on in paragraph 19 *supra*, provides that the two Governments shall perpetually exercise full dominion over the territories which respectively belong to them "*according to the present arrangement*", and that any dispute shall be submitted to the decision of a friendly Power, but that in any case "*the boundary specified in the present Agreement will remain as the immovable one* between the two countries"—(stress added). The argument appears to be that the words italicised, and forming part of the conventional relations between the Parties, are sufficient to act as notice to both that their rights cannot be altered or affected in any way by the unilateral acts of either. The Treaty and the Treaty alone is controlling.

174. The Court cannot accept this line of reasoning. It is clear that the Treaty is controlling, but the critical issue is, what does the Treaty mean? In the event of a dispute, as in the present case, the Parties are

not concerned with the immovable character of the frontier but with the problem of what the frontier is. This is precisely the question that has to be decided. The true effect of Article VI is that, pending arbitration in the event of a dispute, the boundary cannot be *changed* by the unilateral action of either Party: nor could a Party be permitted to adduce evidence in support of the existence of a right to do so, —for Article VI negates any such right. But the question in the present case is not one of attempting to change the boundary, but of determining what the boundary is. For that purpose (the matter having been submitted to arbitration, the Parties must be free to adduce any relevant and legally admissible evidence they can, in support of their respective views, —and for the reasons already stated the Court thinks that evidence of acts of jurisdiction performed by either Party in the disputed area is relevant and legally admissible—not to alter the rights granted by the Treaty or to add to these, or create new rights—but in confirmation of the validity of that interpretation of the Treaty which is alleged to have the effect of conferring the rights concerned. Article VI could not operate to prevent this completely normal process without impeding the very courses of arbitration which the Article itself provides for.

175. The Court therefore, after a review of certain of the principal aspects of the matter, holds that, as with the cartography of the case, evidence of the acts of jurisdiction performed by Chile is admissible and tends to confirm and corroborate the conclusions the Court has reached, affirming her title to the PNL group.

* * *

V. *Dispositif*

176. Accordingly,

THE COURT OF ARBITRATION, —

Taking into account the foregoing considerations, and more particularly for the reasons given in paragraphs 55-111, —

UNANIMOUSLY[a]

1. *Decides*

(i) that Picton, Nueva and Lennox Islands, together with their immediately appurtenant islets and rocks belong to the Republic of Chile[b];

(ii) that the red line drawn on the attached chart, entitled "Boundary-Line Chart"—which forms an integral part of the present Decision (*Compromiso* of 22 July 1971, Article XII (1))—constitutes the boundary between the territorial and maritime jurisdictions of the Republics of Argentina and Chile respec-

[a] See Section F of Part I (Report of the Court).

[b] This wording corresponds to that of the Parties' Requests—Part I (Report), Section C, Articles 1(1) and (2).

tively, within the limits of the area bounded by the straight lines joining the co-ordinate points ABCDEF specified in Article I (4) of the said *Compromiso*, and known as the "Hammer" (Decision, paragraph 1);

(iii) that within this area the title to all islands, islets, reefs, banks and shoals, if situated on the northern side of the said red line, is vested in the Republic of Argentina; and if situated on the southern, in the Republic of Chile;

2. *Determines*—(*Compromiso*, Article XII (3))—that in so far as any special steps are necessary to be taken for the execution of the present Decision, they shall be taken by the Parties, and the Decision shall be executed, within a period of 9 months from the date on which, after ratification by Her Britannic Majesty's Government, it is communicated by the latter to the Parties, together with the Declaration constituting it the Award specified in Article XIII (1) of the *Compromiso*;

3. *Directs* the Parties

(i) to inform it, through the Registrar of the Court, of the steps, legislative, administrative, technical, or other, which they deem it necessary to be taken by either or both of them, in order to execute the present Decision;

(ii) to inform the Court in due course, and in any event within the period specified in paragraph 2 of this Dispositif, of the steps actually taken by them, respectively, for the execution of the Decision;

4. *Declares*, having regard to Article XV of the *Compromiso*, that the Court

(i) continues in being for the purposes specified in paragraph 3 of this Dispositif, until it has notified Her Britannic Majesty's Government that, in the opinion of the Court, the Award specified in Article XIII (1) of the *Compromiso* has been materially and fully executed;

(ii) remains at the disposal of the Parties for the purpose of giving them such guidance or instructions as they may require in order duly to implement the Award.

Done in Geneva this 18th day of February 1977 in a single copy for transmission to Her Britannic Majesty's Government in the United Kingdom in accordance with Article XII (1) of the *Compromiso*, accompanied by the original of the Dispositif dated 31 January 1977 bearing the signature of the four then Members of the Court.

(*Signed*)
G. G. FITZMAURICE
President

(*Signed*)
Philippe CAHIER
Registrar

Judge Gros makes the following declaration*: —

1. I have reached the same conclusion as the Court about the interpretation of Article III of the Treaty of 1881, but by another road and with differences of approach that do not seem to me to call for detailed expression since the Court has not relied upon them, but which I would like briefly to indicate.

2. The present territorial dispute between the two Parties must be viewed from within the complex of its development at the time—from 1810-1881—and in particular from that of the very special relations existing between two States that every factor tends to bring together by reason of their common origins, ethical, political and social outlook and habits of thought in the widest sense. What is in question is not an issue of sovereignty *in abstracto* but—after seventy years of effort—of defining a frontier between Argentina and Chile extending over 5,000 kms. On the specific matter of the disputed islands, information concerning the negotiations of 1881 is still inadequate, but those of 1876 are well documented; and in that context there exists a firm proposal, put forward by the Government of the Argentine Republic, described as non-negotiable, and understood as such by the Chilean negotiator (Barros Arana Telegram of 5 July 1876 and Despatch of 10 July 1876, Chilean Annexes 21 and 22). This is of great importance, since Basis 3 of 1876 was carried over to become the text of Article III of 1881. The responsibility for this text, in 1876, was the Argentine Government's; and it is this same text, as also the accompanying circumstances, explanatory incidents of the negotiations, and the way in which the latter developed, together with the official commentaries which were to follow in 1876 and 1881, that constitute the sources for the interpretation of the clause that attributes the disputed islands.

It is by taking into account all the aspects of those negotiations in 1876-1881, and the special social context of the international relations between the two States, that the intention of the Parties may be rediscovered in the text of Article III—an intention confirmed by the declaration of the political personalities responsible in the matter of the frontier. It is this whole complex comprising the text, its historical origins, the general political circumstances of the negotiation, and the explanation given by the negotiators and statesmen, which decided me to vote for the Decision of the Court.

3. One of the consequences of this approach to the case is a different appraisal of the use to be made of cartography and the acts of the Parties subsequent to the Treaty.

The Parties having chosen in 1876 and 1881 not to make any map, or even a sketch of the frontier in the islands, the Treaty is therefore a treaty without a map. After the Treaty no map at all became the subject of a joint discussion or study during the progress of the dispute, or which could in my view be used to elucidate the meaning of a provision of the Treaty which has already been interpreted by the Court on the

* The original French text, signed by Judge Gros, is in the keeping of the Registrar.

basis of the intention of the Parties as revealed by the text itself. However, since the two Governments had devoted a very large part of the written submissions and the pleadings to the question of cartography as corroborative evidence in case difficulties or defects in the interpretation of the Treaty should make that necessary, the Court proceeded to a study in depth of that aspect of the matter. Personally, while recognizing the interest and utility of that study, I would point out, on the one hand, that it was not necessary from the legal point of view once the meaning of Article III had been decided on the basis of the text and of all the historical circumstances, and, on the other, that the Parties themselves, at the time of the Treaty and in the years which followed, attached to that same non-concordant cartography only a minimal degree of interest (cf. the Chilean Minister for Foreign Affairs in 1892 when the British Minister at Santiago had submitted to him a probem concerning contradictory Argentine maps: documents 60a and 61b; Chilean Annexes, pp. 187a and 188b). The maps submitted to the Court are facts which cannot by themselves prove anything against the Treaty when the meaning of the text is held to be or recognized as clear, and they should simply be considered within the context of the relations of the two Parties *inter se* as I have described them to be. In these special relations concerning frontier problems, the situation is as the Chilean Minister said, namely that "with such a precise description of the possessions of the two countries in the Treaty it [is] immaterial what geographers chose to publish on the subject"—speaking of two maps of which at least one is considered to be an official Argentine map (quotation from a document of 1892 cited above).

Furthermore, the objections of principle put forward by the Argentine Government with reference to the question of maps as evidence of the meaning of the Treaty, appear to me to be based on a correct interpretation of a formal legal undertaking contained in Article VI of the Treaty of 1881. According to that Article (Decision of the Court, paragraph 15) the two Governments shall exercise their full sovereignty over the territories defined by the Treaty; thus no act imputable to one of the States can compromise that frontier, whether or not with intention to modify it, and it is difficult to see what effect such a unilateral act could have on the treaty rights of the other State, if those rights exist by virtue of the Treaty—and if they do not exist, *cadit quaestio*. Moreover, Article VI goes on to bind the Parties to submit to arbitration any dispute whatsoever arising out of the Treaty, stating expressly that "in any case the boundary specified [in the Treaty] will remain as the immovable one between the two countries". There is thus, consolidating Article 39 of the 1855 Treaty of Perpetual Peace, Friendship, Commerce and Navigation, a permanent two-fold obligation between the two Parties, to negotiate and submit to arbitration all questions of their treaty relations concerning the frontier. The treaty relations, in conjunction with the special historically interwoven pattern resulting, above all, from the intra-American international law rule of *uti possidetis juris* interpreted and affirmed in the Treaty of 1881, render any unilateral act void of legal effect as a claim to, or evidence of a revision of the frontier as laid down

in the Treaty. For these reasons the study of the cartography, however interesting it may have been, appears to me devoid of legal relevance. The same applies *a fortiori* to the cartographical studies and technical analyses of the movements or tracks of ships in the area, contained in Annexes II and III to the Court's decision.

4. It is clear that, for the reasons given in paragraphs 2 and 3 above, I cannot follow the Court in its views concerning the conduct of the Parties after the Treaty, which is equally lacking in relevance, if account is taken of the treaty relations and general principles of law binding on the Parties in the period under consideration.

The conduct of the Parties can only be understood by looking to the effect which they themselves attributed to it at the time, and not by a retroactive introduction of principles totally alien to the attitude of the two States in question; and it is easy to see that neither the one nor the other attached importance to the acts of either in the islands region as regards the interpretation of Article III of the Treaty. When difficulty became apparent in 1904, the conduct of the Parties shows that they regarded the question of the frontier in the islands as remaining to be settled by negotiation; and the Chilean Government accepted this as something normal (cf. Chilean Documents 72, 73 and 74), without in any way relying on its acts in the islands. The two Governments thus recognized, by that date at the latest, that the problem was one of the application of the Treaty. It does not seem to me possible to reconstruct *a posteriori* a present day interpretation of the relations between the Parties, in order to draw conclusions from these that are not based on what they really were.

ANNEXES

I. The 1967 Chilean Notes
II. British inter-departmental exchanges, September 1915–January 1919
IIA. Extracts from the Argentine written Reply
III. Sea-traffic to and from the eastern Beagle Channel region
IV. The tracing of the boundary-line
V. (1) Inaugural speech of the President of the Court, Alabama Room, Geneva, 7 September 1976; and (2) closing speech at the end of the oral hearing, 23 October 1976

ANNEX I

The Chilean Notes of 11 December 1967, exclusive of Annexes B-D thereto (see Decision, paragraph 2)

CHILEAN AMBASSADOR IN LONDON TO THE BRITISH FOREIGN SECRETARY

London, 11th December, 1967.

No. 43
VSC/BS

MONSIEUR LE MINISTRE,

I have the honour, on the instructions of my Government, to refer to the General Treaty of Arbitration of 1902 between Chile and the Argentine Republic, under which Your Excellency's Government were good enough, as recently as 1966, to render such

important service to the cause of good relations between Chile and the Argentine Republic. As Your Excellency is aware, the Award which Her Majesty's Government then delivered has been fully implemented by both Parties.

I enclose (Annex A) an English translation of a Note that the Minister for Foreign Affairs of Chile is delivering to H.E. the Ambassador of the Argentine Republic in Santiago, in which he refers to another dispute between the two countries. As Your Excellency will observe, the Argentine Republic has been questioning the sovereignty of Chile over certain islands and islets in the region of the Beagle Channel, thus giving rise to the present dispute.

I also enclose English translations of the three Protocols of 1915, 1938 and 1960 (Annexes B, C and D)* referred to in the above-mentioned Note, by which the Governments of Chile and of the Argentine Republic attempted to arrange for a judicial solution of this dispute but without success.

In the Note of the Minister for Foreign Affairs of Chile to the Ambassador of the Argentine Republic, enclosed herewith, mention is also made of further and repeated negotiations during the past three years, which have also proved to be fruitless. Thus the default of agreement between the Parties is made abundantly clear.

As it is imperative to find an early solution to this dispute, and having regard to the above-mentioned default of agreement, the Government of Chile have decided to have recourse to Her Majesty's Government as permanent arbitrator under the 1902 General Treaty of Arbitration, and in this connection to invite them to intervene as Arbiter in the manner provided for in Article 5 of that Treaty.

Accordingly, and under the formal instructions of my Government, I have the honour to request Her Majesty's Government to exercise in relation to the aforesaid dispute the arbitral functions entrusted to them in 1902 and graciously accepted by the British Sovereign in 1903, and to initiate therefore the proceedings provided for in the 1902 Treaty.

May I avail myself of the opportunity of stressing the importance which the Government of Chile attaches to this renewed assistance by Her Majesty's Government towards the maintenance of friendly relations between Chile and the Argentine Republic and generally to the furtherance of the cause of peaceful settlement of international disputes.

I have the honour to be, with the highest consideration,

Monsieur le Ministre,

Your Excellency's obedient Servant,
Víctor SANTA CRUZ
Ambassador of Chile

The Rt. Hon. George Brown, M.P.,
Principal Secretary of State for Foreign Affairs,
Foreign Office,
Whitehall,
S.W.1.

ANNEX A TO ANNEX I (see above)

CHILEAN FOREIGN MINISTER TO ARGENTINE AMBASSADOR IN SANTIAGO

Santiago, 11th December, 1967.

MONSIEUR L'AMBASSADEUR,

As Your Excellency is aware, the Government of the Argentine Republic have been questioning the sovereignty of Chile over certain islands and islets stituated in the region of the Beagle Channel.

* Not now annexed.

I may recall that in the past century, after prolonged discussions between our two Governments concerning their territorial limits, they signed on the 23rd July, 1881, the Boundary Treaty which put an end to those discussions.

This Treaty, which determined the immovable frontier between the two countries, refers to the southern part of the Continent in the provisions of its Articles 2 and 3, which read as follows:

> "Article II. In the southern part of the Continent, and to the north of the Straits of Magellan, the boundary between the two countries shall be a line which, starting from Point Dungeness, shall be prolonged by land as far as Monte Dinero; from this point it shall continue to the west, following the greatest altitudes of the range of hillocks existing there, until it touches the hill-top of Mount Aymond. From this point the line shall be prolonged up to the intersection of the 70th meridian with the 52nd parallel of latitude, and thence it shall continue to the west coinciding with this latter parallel, as far as the divortia aquarum of the Andes. The territories to the north of such a line shall belong to the Argentine Republic, and to Chile those extending to the south of it, without prejudice to what is provided in Article III, respecting Tierra del Fuego and adjacent islands.
>
> "Article III. In Tierra del Fuego a line shall be drawn, which starting from the point called Cape Espíritu Santo, in parallel 52°40′, shall be prolonged to the south along the meridian 68°34′ west of Greenwich until it touches Beagle Channel. Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentine on the eastern. As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those to the west of Tierra del Fuego."

The provisions above quoted recognised the sovereignty of Chile over all the territories extending to the south of the boundary line described in Article 2, subject only to the specific exceptions established in Article 3.

The full sovereignty of Chile in this southern extremity of the Continent, which the 1881 Treaty together with its correct interpretation and fulfilment came to confirm, was not disputed by Argentina during the decades after the signature of that instrument.

Only at the start of the present century, and on the basis of varying and sometimes contradictory interpretations of the 1881 Treaty, did some disposition manifest itself in Argentina to question Chile's title to Picton and Nueva Islands and adjacent islets, over which Chile was—and still is—exercising full sovereignty. Argentina did not then express doubts on Chile's title to Lennox Island.

Notwithstanding that the Government of Chile have always been—as they are now—absolutely convinced of their rights over the islands and islets in question, they agreed to seek together with the Government of the Argentine Republic a formula which would lead to an arbitral solution of the question ultimately raised by the latter concerning Chile's title to those islands and islets.

Following extended negotiations, on the 28th June, 1915, a Protocol was signed in Buenos Aires in accordance with which the Government of His Britannic Majesty was to be asked to determine to which of the High Parties "belonged sovereignty over the islands of Picton, Nueva, Lennox and adjacent islets and islands lying in the Beagle Channel, between Tierra del Fuego to the north and Dumas Peninsula and Navarino Island to the south."

As it may be observed, in this instrument the Argentine Republic sought to place in doubt the Chilean title to Lennox Island.

This Protocol, for reasons which it is not necessary to elaborate, was not completed and did not come into operation, and thus this attempt to reach a solution was frustrated.

A similar result befell the Agreement which, with the same object in view and in the same terms, was signed in Santiago by the Ministers for Foreign Affairs of both countries, on the 4th May, 1938. The distinguished North American jurist, which the Instrument

named as arbitrator, was unable to take up his functions for reasons which are well known to Your Excellency's Government.

About fifteen years later, both Governments entered into new discussions on the matter, but these were no less inconclusive.

Negotiations were resumed in 1959 and on the 12th June, 1960, another Protocol was signed in Buenos Aires with a view to resolving the dispute. In accordance with this instrument and in the terms there set out, it was decided to place the dispute before the International Court of Justice. In the text of this document Argentina no longer persists in her pretentions to Lennox Island.

The fate of this Agreement was no better than that of its predecessors; neither the Chilean Congress nor the Congress of the Argentine Republic gave it the necessary approval and thus the solution of the dispute was once more postponed.

This was the position when by a Note dated 30th October, 1964, Your Excellency's Government informed the Government of Chile that "they had decided to submit the case of the Beagle Channel to the International Court of Justice". When transmitting this "formal decision to have recourse to the principal judicial organ of the United Nations", the Argentine Foreign Minister expressed in the name of his Government their hope that steps would be taken to place this matter before that Court.

The Government of Chile immediately expressed their concurrence in this Argentine initiative, which gave promise once more of the solution that had been sought unavailingly for so many years. Evidence of this is contained in the Declaration signed by the Ministers for Foreign Affairs of Chile and the Argentine Republic on the 6th November, 1964, in which they expressed their willingness "to initiate conversations with a view to reaching the necessary agreement to submit the case to the Court in question".

These conversations began, on the initiative of the Government of Chile, early in 1965. Your Excellency's Government are aware of the many negotiations that, as a result of the Joint Declaration, took place in order to reach that agreement.

I should like to point out that in spite of the determined and constant efforts of Chile to facilitate the course of these negotiations and reach the required agreement, the dispute is still unsettled and we have not advanced one step towards the preparation of a formula which would have led to its solution. The common desires which inspired the two Governments when signing the Joint Declaration of 6th November, 1964, have therefore been frustrated, and that Declaration has proved to be no more than another abortive attempt to find the terms for a solution. Thus the default of agreement between the Parties is evident.

The prolongation of this dispute disturbs the cordial relations between both countries and leads to the risk of serious incidents.

In these circumstances, the Government of Chile are glad to be able to recall that the General Treaty of Arbitration, signed by our two Governments on the 28th May, 1902, establishes the very procedures appropriate for the solution of a difference such as that which is now our concern. And this instrument has demonstrated its efficacy, for very recently the Award delivered under the provisions of this General Treaty gave final resolution to another dispute between our two Nations.

The Government of Chile, determined as they are to reach a final solution of this longstanding dispute in the region of the Beagle Channel through legal means, and faithful in their observance of International Agreements, have decided to invoke the aforesaid Chilean-Argentine General Treaty of Arbitration. Having recourse to the right conferred on them by Article 5 of that instrument, they are requesting Her Britannic Majesty's Government to exercice in relation to that dispute the arbitral functions which Chile and Argentina entrusted to them in 1902.

In deciding to exercise the right confered upon them by Article 5 of the General Treaty of Arbitration, the Government of Chile are seeking a legal solution and also, as Your Excellency will certainly appreciate, the removal of every obstacle that may disturb or delay the ample and general co-operation between Chile and Argentina, so necessary for the full development of both Nations.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.

(*Signed*) Gabriel VALDÉS S.

H.E. Señor Don Manuel E. Malbran,
Ambassador Extraordinary and Plenipotentiary of Argentina,
Santiago.

ANNEX II

British inter-departmental exchanges, September 1918–January 1919
(see Decision, paragraph 89)

No. 1

MINUTE BY THE HYDROGRAPHER OF THE BRITISH ADMIRALTY, SEPTEMBER 1918

With reference by my minute of 18th September 1915 on F.O. papers 9th June 1915, (formerly M.04488) in which I observed that a further investigation on the subject of the Beagle Channel Controversy might furnish further evidence, a most exhaustive examination has now been carried out in this Department which it is hoped will throw further light upon this important question, but before submitting the result and conclusions for consideration it is most desirable to ascertain if the question of arbitration has altered in any material point from the aspect which it assumed to their Lordships on 1st October 1915 (see letter of that date to Foreign Office herein).

J. F. PARRY
Hydrographer

No. 2

LETTER, THE SECRETARY OF THE BRITISH ADMIRALTY TO THE BRITISH FOREIGN OFFICE, 9 SEPTEMBER 1918

9th September, 1918.

Dear Sperling,

In September 1915 we had some semi-official correspondence about the Beagle Channel Arbitration, and on the information you then gave we said in an official letter of 1st October 1915 (M.04488) that we understood that Argentina and Chile had agreed to defer the definite submission of the matter to H.M. Government until after the war.

Can you say if this is still the position? The reason we want to know is that the Hydrographer has since accumulated some further data on the subject, which he might work up into a considerable statement if there were any chance of the arbitration coming on at an early date. If however that is improbable it would hardly be worth his while to do it when there are plenty of more important things to attend to, especially as still further data may be discovered.

Your sincerely,
W. F. NICHOLSON.

No. 3

LETTER, THE BRITISH FOREIGN OFFICE TO THE SECRETARY OF THE BRITISH ADMIRALTY, 26 SEPTEMBER 1918

Foreign Office, S.W.1
September, 26, 1918.

Dear Mr. Nicholson,

In Sperling's absence I am replying to your letter to him of September 9th about the Beagle Channel Arbitration.

The position has not altered since 1915, that is to say His Majesty's Government are not officially pledged to accept the arbitration and it is understood that in any case we shall not be asked to do so by the two Governments until after the war. As a matter of fact the Protocol between Argentina and Chile agreeing to settle the dispute by arbitration appears not yet to have passed the Lower Chamber at Buenos Aires and you will see from the enclosure in a despatch from Sir R. Tower—a copy of which is now being sent to the Admiralty—that there is some reason to think that the matter may never come to arbitration in the end.

In view of the above mentioned despatch we are acting on a suggestion which the Director of Military Operations made some time ago and are asking confidentially for the views of Sir Thomas Holdich who was the Chief Commissioner on the Chile-Argentina Boundary Commission of 1901 and who passed through the Beagle Channel in that year.

In the circumstances it would seem hardly worth while for the Hydrographer to subordinate other important work to the preparation of a statement on the Beagle Channel dispute at the present time.

Your sincerely,
Richard SEYMOUR.

No. 4

LETTER, THE BRITISH UNDER-SECRETARY OF STATE FOR THE FOREIGN OFFICE TO SIR THOMAS HOLDICH, 26 SEPTEMBER 1918

The Under-Secretary of State for Foreign Affairs presents his compliments to Sir Thomas Holdich and begs leave to state that the possibility has arisen of His Majesty's Government being invited at a future date to act as arbitrator in a boundary dispute between Chile and Argentina respecting the Beagle Channel. Mr. Balfour would be grateful if he might be furnished with Sir T. Holdich's views on the matter at issue, as he understands that in the course of the work of the Commission which investigated the Chile-Argentina boundary in 1901, Sir Thomas passed through the Beagle Channel.

The question which the two Governments concerned have proposed to submit to arbitration is defined as follows: —

> "To which of the High Contracting Parties appertains the sovereignty over Picton, New and Lennox Islands, the adjacent small islands and the islands which are situated in the Beagle Channel between Tierra del Fuego to the North and Dumas Peninsula and Navarino Islands to the South."

The territorial limits of Chile and the Argentine Republic in Tierra del Fuego are, as Sir T. Holdich is aware, fixed by a line starting from Cape Espíritu Santo at latitude 52·40, and following longitude 68·34 West (Greenwich) to Beagle Channel. The Argentine Republic owns Isle de los Estados and the other islands in the Atlantic and East of Tierra del Fuego and the wastes of Patagonia, while to Chile belong all the islands South of Beagle Channel down to Cape Horn and those west of Tierra del Fuego. The Argentine Republic

claims that the three islands of Picton, Lennox and Nueva are situated in the Atlantic and East of a line drawn from the Eastern end of the Beagle Channel to Cape Horn, while Chile maintains that the Beagle Channel continues East between the mainland and the Eastern extremity of Picton Islands, and that therefore these islands lie South of the Beagle Channel and West of a line drawn from its Eastern extremity to Cape Horn.

The question therefore resolves itself virtually into the determination of the Eastern end of Beagle Channel.

Should Sir T. Holdich be able, from his personal knowledge of the region, to express a view of the position of the end of the Channel and on the conflicting claims of the two Republics, Mr. Balfour will much appreciate his assistance in the matter.

Foreign Office, S.W.1.
September 26th 1918

No. 5

LETTER, SIR THOMAS HOLDICH TO THE BRITISH UNDER-SECRETARY OF STATE FOR THE FOREIGN OFFICE, 30 SEPTEMBER 1918

Royal Geographical Society,
Kensington Gore,
London, S.W.7.

30 September 1918

Sir Thomas Holdich presents his compliments to the Under-Secretary of State for Foreign Affairs and in reply to his No. 153002/2/A referring to the dispute between the Argentine and Chilean Republics concerning the sovereignty over Picton, New and Lennox Islands, begs to submit the following statement.

This dispute was informally discussed when I was navigating the Beagle Channel in the Argentine gun-boat *Patria* during the progress of the Chile-Argentina Boundary Commission in Patagonia; consequently I took note of the position of the islands in question.

The vague geographical definitions which are at the very root of the dispute must necessarily have an arbitrary meaning given to them in order to arrive at any conclusion whatever.

To the eastern "end of the Beagle Channel" the eastern "entrance" to that Channel must be assumed as the equivalent, and the point to determine is, which is the eastern "entrance". The geographical position of Picton Island divides the eastern approach to the Channel into two actual entrances. That to the west of the island is the one to which Darwin refers in his "Voyage of a Naturalist round the World" as connecting the Goree roads (where the *Beagle* was anchored) with the Channel. That on the north-east side of the island is the one by which the *Patria* entered from Staten Island, and it is undoubtedly in my opinion the main or chief entrance. It was a grey misty afternoon but visibility was good enough to enable me to see the headlines both north (Cape Piu) and south of the entrance, and to note the shallowing of the water over the approach (there is no actual bar). This was certainly regarded as the entrance by the commander of the *Patria* at that time. Whether it was so regarded when the treaty of 1881 between the Chilean and Argentine Governments was made is only to be decided by historical references, which can be readily made if necessary (they will be found in "La Soberania Chilena en las islas al sur del Canal Beagle", published at Santiago de Chile in 1917), but I am strongly of opinion that it is modern practices in navigation and not historical references which should weigh most deciding a dispute of this nature. On the whole it is clear that the entrance which I noted between Cape Piu and the south-eastern extremity of Picton Island is the one which has been generally accepted and used by navigators.

A line drawn from the eastern "end" of Beagle Channel to Cape Horn must start from some fixed point. Again it must be assumed that the point in question is either at one end of the "entrance" or in the middle of it. It is not a matter of great consequence which point is selected. Taking the middle point, this line would leave the islands of Picton and Lennox to the west and Nueva to the east of it. This would give the first two islands to Chile and the last to Argentina. Only a line drawn from the centre of the entrance on the south-west of Picton Island to Cape Horn could leave all three islands to the east and consequently to Argentina. Even then the question would arise whether these islands are south of the Beagle Channel. I think that clearly by "south" is meant "due south" and not south-east, and that consequently Nueva should be adjudged to Argentina by the terms of the treaty and not to Chile. But the expression "south of the Beagle Channel" does not include islands in that Channel, and here a discrepancy (one of many) arises between the official maps of the two republics and the terms of the treaty. Both maps (the latest Chilean map dates from 1911, but I have no Argentine map later than 1901) agree in carrying the boundary along mid-channel, leaving certain islands off the northern coast of Navarino to Chile. We may consequently assume that no question arises of interpretation of the treaty along this portion of the boundary.

My opinion then is that the islands of Picton and Lennox should be adjudged as Chilean, and Nueva as Argentine under the terms of the treaty. Geographically no doubt all these islands belong to the same group but there are no ethnographical or political problems likely to arise from their possible separation, and the only question is one of naval strategy and security. Undoubtedly Argentine interests prevail in the Beagle Channel. Harberton and Ushuaia are important centres of sheep farming and their timber industry, and the navigation of the Channel is (or was) almost entirely Argentine.

That Chile should retain a preponderating control of the eastern entrance by the occupation of all three islands under modern conditions of naval warfare (which admits of submarine bases) appears to be most inadvisable, so that, in spite of the difficulties which may be expected to arise from the division of a geographical group, the award of Nueva to Argentina appears more likely to lead to a satisfactory issue than any other. I may be permitted to add with reference to certain criticisms that have recently appeared that in my book "The Countries of the King's Award" I purposely made no reference whatever to the dispute.

(*Sgd*) T. H. HOLDICH
Pres. Royal Geographical Society.

No. 6

LETTER, THE BRITISH UNDER-SECRETARY OF STATE FOR THE FOREIGN OFFICE TO THE SECRETARY OF THE BRITISH ADMIRALTY, 9 OCTOBER 1918

Foreign Office, S.W.1.
October 9th, 1918.

Sir,

With reference to the letter from this department No. 153002 of the 25th ultimo, forwarding a despatch from His Majesty's Minister at Buenos Aires relative to the dispute between the Argentine and Chilean Governments regarding the sovereignty of certain islands in the Beagle Channel, and to the recent correspondence with Mr. W. F. Nicholson on the same subject, I am directed by Mr. Secretary Balfour to transmit to you herewith, to be laid before the Lords Commissioners of the Admiralty, a copy of correspondence with Colonel Sir. T. Holdich on this subject.

In view of the opinion expressed by Sir T. Holdich which, as will be seen, differs in some important respects from that put forward in Dr. Moreno's memorandum, Mr. Balfour would be glad if he might, notwithstanding the reply addressed to Mr. Nicholson on

the 26th ultimo, be favoured with a considered statement on the merits of the respective claims of the two Governments.

A copy of a despatch which is being addressed to Sir R. Tower on this subject is enclosed herein; a similar letter is being sent to His Majesty's Minister at Santiago.

I am,
Sir,
Your most obedient,
humble Servant,
(*Sgd.*) (Illegible.)

No. 7

MINUTE BY THE HYDROGRAPHER OF THE BRITISH ADMIRALTY,
20 DECEMBER 1918

I attach herewith a memorandum on this subject based on researches which have been carried out in this Department.

It will be seen that the conclusions arrived at in this memorandum differ from the views of the President of the Royal Geographical Society, and attention is drawn to the following remarks: —

(1) The geographical definitions which are alluded to as being vague in paragraph 3 are not considered so in this Department.

(2) It is not considered that any geographical definition found in the "Voyage of a Naturalist round the World" can possibly be as authoritative as those given by the Explorers in their original reports.

(3) The statement that "modern practices in navigation" can be considered in this connection appears quite inadmissible.

(4) It is not considered that this question is in any sense "one of naval strategy and security"; for such considerations, which obviously may vary from time to time, cannot possibly be allowed to affect interpretation of established Treaties.

(5) It is to be observed that although this Department in its Memorandum has drawn attention to the existence of a legal problem arising out of acts of jurisdiction exercised by the Chilean Government over the three islands in question, this aspect has not been dealt with by the President of the Royal Geographical Society; and it is suggested that it is of sufficient importance to be referred for legal opinion.

J. F. PARRY
Hydrographer,
20 December, 1918.

Submitted to send Hydrographer's memo. to F.O. with covering letter at attached. Hydrographer concurs.

W. F. NICHOLSON

No. 8

LETTER, THE SECRETARY OF THE BRITISH ADMIRALTY TO THE UNDER-SECRETARY OF STATE FOR THE BRITISH FOREIGN OFFICE, ENCLOSING THE HYDROGRAPHER'S MEMORANDUM, 28 DECEMBER 1918

Admiralty,
28th December 1918

Sir,

In reply to your letter of the 9th October 1918, No. 165125/2/A, I am commanded by My Lords Commissioners of the Admiralty to transmit herewith, to be laid before the Secretary of State for Foreign Affairs, a Memorandum by the Hydrographer of the Navy on the Beagle Channel.

2. This Memorandum treats the subject exclusively from a geographical and hydrographical point of view, and so far as that aspect of the matter is concerned Their Lordships have nothing to add.

3. If it is the view of the Secretary of State for Foreign Affairs that other aspects need to be considered, and that Their Lordships' opinion on such aspects would be of value, I am to suggest that specific questions should be put to this department.

I am,
Sir,
Your obedient Servant,
The Under-Secretary of State,
Foreign Office,
W. F. NICHOLSON.

No. 9

MEMORANDUM BY THE HYDROGRAPHER OF THE BRITISH NAVY

With reference to the request of S. of S. for F.A. for a considered statement of the claims of the Argentine and Chilean Governments to sovereignty over Picton, Lennox and New Islands, (M.46549) the following memorandum is submitted.

Before entering into a detailed discussion of the problems raised by the contending claims of the Argentine and Chilean Governments to sovereignty over the islands at the eastern entrance of the Beagle Channel, a brief review of the geographic and diplomatic history of the question will not, perhaps, be superfluous; for it is the opinion of the Hydrographic Department that the controversy turns upon a geographical problem, which, by its importance, entirely dominates all other aspects of the question.

The Beagle Channel runs in an easterly and westerly direction along the 55th parallel of South latitude, through the archipelago of islands lying between the mainland of Tierra del Fuego and Cape Horn, and its existence was unknown until the early part of the 19th century.

After the discovery of the Magellan Straits in 1520, little attempt was made by either Spanish or English navigators to extend their explorations to the south of that waterway; although Garcia de Loayza and Drake were successful in their attempts to navigate into a higher latitude. In 1615, however, a Dutch expedition under Le Maire discovered that a passage between the Atlantic and Pacific Oceans existed to the South of Magellan Straits; the discoverer rounded Cape Horn, and returned to Europe by the Pacific and Indian Oceans.

The results of Le Maire's voyage were confirmed by a Spanish expedition, which set out three years later, under the command of Bartolomé García Nodal, Gonzalo Nodal and Diego Ramírez Arellano. Certain erudite persons, inclined to speculation, have asserted that the leaders of this latter expedition may justly be regarded as the first discoverers of

the Beagle Channel; but an examination of the arguments by which this statement has been supported is not necessary. The report of the voyage of the Nodales, written in Spanish, is vague and guarded in its wording; and the claims that these explorers were the first discoverers of the Beagle Channel is advanced by no more than an ingenious system of guess-work.

In the 18th century, the expeditions of Cook, of L'Hermite, and of Bougainville, gave to Europeans a more accurate knowledge of the configuration of the archipelago that surrounds Cape Horn, but without actually discovering the waterway traversing it.

In 1825, a British Expedition of two ships set out from Plymouth on a voyage of exploration to the coasts of South America. The "Adventure" was commanded by Captain Philip Parker King, the leader of the expedition; the "Beagle" by Captain Pringle Stokes, who died on the voyage, and was succeeded by Captain Robert Fitzroy in this command.

During the months of March, April and May, 1830, Captain Fitzroy in the "Beagle", acting independently of the "Adventure", discovered and explored the Beagle Channel.

When leader of a subsequent expedition to the coasts of South America, Captain Fitzroy navigated in the Channel which he had previously explored, without adding to, or modifying, his original descriptions of its form and extent.

During the 19th century, missionaries, Argentine and Chilean settlers, and the results of scientific expeditions in the French vessel "Romanche", and the Argentine vessel "Almirante Brown" enlarged our knowledge of the region, and confirmed opinions generally held as to its barren, desolate and inhospitable nature.

In the year 1881 a Boundary Treaty was drawn up between the Chilean and Argentine Governments, wherein the continental and maritime boundaries of the two countries were laid down.

Article 3 of this Treaty defines the boundary in the Beagle Channel; and, as the terms of the article have been the ground of the dispute, it is not inappropriate to quote in extenso:

> "Art. III. Tierra del Fuego is divided by a line starting from Cape Espíritu Santo at latitude 52°40′ south, and following longitude 68°34′ west (Greenwich) to the Beagle Channel. Divided thus, Tierra del Fuego is Chilean to the west and Argentine to the east. In regard to the other islands, Isla de los Estados belongs to the Argentine Republic with the islets next it, and the other islands in the Atlantic and east of Tierra del Fuego and the coasts of Patagonia; while to Chile belong all the *islands south of Beagle Channel down to Cape Horn*, and those west of Tierra del Fuego".

Chile interpreted this article of the Treaty in the sense that Picton, Lennox and New Islands lay to South of the Beagle Channel, and therefore belonged to her; and acting under this conviction, peformed various acts of jurisdiction and possession, the legitimacy of which does not appear to have been disputed for nearly twenty years.

In 1893, a further Boundary Treaty was agreed upon by the Chilean and Argentine Governments; it was termed a "Protocol Aclaratorio", and was intended to give precision to certain provisions of the earlier Treaty, since a correct interpretation of some of the articles of that agreement had been rendered difficult in the light of subsequent geographical exploration in the Andes.

The second Article of this Protocol states clearly the general principle upon which the agreement was based, and runs as follows:

> "Secondly: The undersigned declare, that, in the opinion of their respective Governments, and according to the spirit of the Boundary Treaty, the Argentine Republic shall maintain its dominion and sovereignty over all territory which lies to the East of the main chain of the Andes as far as the shores of the Atlantic; and that the Republic of Chile shall maintain its dominion and sovereignty over all territory to the West of the aforesaid chain, as far as the shores of the Pacific; it is further to be understood,

that, by the articles of the said Treaty, the sovereignty of each state over the respective littoral is absolute, so that Chile can have no claim over any point towards the Altantic, just as the Argentine Republic can have no claim towards the Pacific. If, in the Southern peninsula, in the vicinity of the parallel of fifty-two degrees, the Cordillera shall be proved to lie between inlets of the Pacific there existing, the experts shall make a special study of the terrain, and shall establish a boundary line which shall leave to Chile the shores of the aforesaid inlets, and both governments shall amicably settle all questions arising out of the said examination of experts".

In 1903, the British Government, as arbiter, gave a decision not relevant to the subject of this memorandum, upon the manner in which the boundary between the two Governments should be laid down in the vicinity of Last Hope Inlet.

Having thus reviewed the exploration of the regions now in dispute, and the diplomatic negotiations by which they were partitioned, the arguments advanced by the contending Governments to support their claims of Sovereignty over Picton, New and Lennox Islands, in so far as they are known, may be briefly stated.

It is claimed by the Argentine Government that the form and limits of the Beagle Channel have never been defined so closely as to make it certain that the term "islands to the South of the Beagle Channel" should be regarded as applicable to Picton, Lennox and New Islands; that the eastern mouth of that Channel may be considered to include all the islands in question, which cannot, therefore be assumed to lie to the South of it; or else, that the channel may be regarded as terminating to the West of Picton Islands, which, together with Lennox and New Islands must be considered to lie in Moat channel (See attached chart cutting): that the basic principle of the 1893 Protocol, to the effect that the Argentine Government should have exclusive possession of ports upon the Atlantic, and that Chile should exercise exclusive dominion over those situated upon the Pacific, cannot be reconciled with Chilean possession of Picton, New and Lennox Islands, all of which lie on the former ocean and that these circumstances combine to render an arbitrational decision upon the subject imperative.

It is argued by the Chilean Government that an inspection of the works in which the original explorers of the Beagle Channel recorded their discoveries, makes it evident that the form and limits of that channel were defined in such a way as to justify the manner in which the Chilean Government has interpreted the words "islands to the S. of the Beagle Channel"; that the claim of the Argentine Government, to the effect that the islands under discussion lie in Moat Channel, is inadmissible; since the definition of the Beagle Channel, given to that waterway by its first explorers, invalidates the argument: that the acts of jurisdiction, performed by Chile over Picton, New and Lennox Islands, during the years following the 1881 Treaty, confirm the claim of that country to the undisturbed exercise of her sovereign rights over those islands; that the 1893 Protocol referred only to a certain portion of the continental boundary between the two republics, and that neither its basic principle nor particular provisions are applicable to the maritime frontiers of Argentine and Chile.

It is therefore evident that the contentions of the Republics hinge primarily upon two questions:

(1) What is the form and what are the limits, of the Beagle Channel; and

(2) What is the correct interpretation of that portion of the Boundary Treaty of 1881, which has occasioned the present controversy.

The argument of the Argentine Government, upon the degree to which the Protocol is applicable to the litigation, is a secondary one, which can only be answered by International Jurists.

In the opinion of this Department, however, the first question is by far the most important, and its correct solution would appear to settle the controversy in an equitable manner. It is therefore now proposed to examine every passage in the published works of the discoverers of the Beagle Channel, wherein that waterway is described or mentioned

to see whether the recorded opinions of the Explorers themselves make it certain what ideas they entertained with regard to its size, shape and extent; to investigate the manner in which they regarded the feature now shewn on the Admiralty charts as Moat Channel, in view of the importance that it has assumed in this controversy; and, finally, to apply the results of this examination to the text of the 1881 Boundary Treaty.

The books, and MSS documents, written by the first explorers should now be enumerated, as it is upon the evidence which they contain that the conclusions of this Memorandum are based.

The works in question are as follows:

(*a*) The report of discoveries made during the first expedition, forwarded by Captain King to the Admiralty under cover of his letter of proceedings dated 15th October 1830, Plymouth Sound. This report has never been published and is at present in the custody of the Public Record Office.

(*b*) A lecture given by Captain King to the Royal Geographical Society in 1831, and printed in the Journal of the proceedings of that Society for the year in question.

(*c*) The Sailing Directions for the coasts of the Eastern and Western Patagonia by Captain Philip Parker King, 1832.

(*d*) The second edition of the Admiralty Sailing Directions for the Eastern and Western coasts of Patagonia written by Captains King and Fitzroy in collaboration, and published in 1852.

(*e*) The 3rd and 4th editions of those Sailing Directions, edited by Fitzroy.

(*f*) The first edition of Admiralty Chart No. 1373, upon which the discoveries of the Beagle and Adventure were shewn.

(*g*) The Narrative of the surveying voyages of H.M. Ships Adventure and Beagle written by King, by Fitzroy and by Darwin in collaboration.

(*h*) All subsequent editions of the Admiralty Sailing Directions.

A few remarks should be added upon the relative trustworthiness and significance of these books and documents. They consist, in the first place, of books and reports written by the first explorers of the Beagle Channel, and, in the second, of books edited at a later date by other persons; these latter, although possibly more complete in certain technical matters than the earlier editions, cannot be considered as being of equal authority to the works of the first explorers in the matter of geographic definitions, for it is an established axiom of geographic science that such nomenclature as the discoverers of any region shall originally have given to its natural features, shall be preserved without alteration; and that all departures from the expressed intentions of the first explorers in such matters, should be condemned, and corrected in so far as later discoveries and explorations permit.

With regard to the Matter before us, viz: the correct geographical definition of the Beagle Channel, —no subsequent exploration has altered such conceptions of its form and shape as were held by those who first discovered it; and it is the object of this Memorandum to give accurate interpretation of their recorded opinions upon the subject.

But, as the works in which Captains King and Fitzroy have described the Beagle Channel are numerous, and were published at widely different dates, it is evident that, in this case, those of later date should carry more weight than the earlier publications, in that in them they may be assumed to have expressed their more considered, and, when necessary, corrected, conclusions.

For this reason the 4th Edition of the Admiralty Sailing Directions for this locality are regarded as the standard text, which must be taken as of more authority than any other in the case of discrepancy. This book was the last edition of Sailing Directions written by Fitzroy, and must therefore be considered to embody his final and considered opinions; all later editions were written by other persons and are, in consequence, of less authority on the point at issue.

Finally, a word should be added about the Narrative of the surveying voyages of H.M. Ships Adventure and Beagle. This work is one of the most popular books in travel in the English language, but its authors were not concerned with giving to the regions explored those exact geographical definitions which appear in the Admiralty Sailing Directions, and such descriptions of natural features as the book contains are primarily introduced for the entertainment of the reader. The Narrative has therefore been regarded as of special importance only where it records the circumstances under which the Beagle Channel was discovered; but such accounts of coasts, bays, inlets and channels are to be found in its pages, have not been considered as of equal weight to those passages in the Sailing Directions wherein the same features are described.

Having stated the principles upon which the original sources of information have been examined, it is now possible to review the circumstances under which the name Beagle Channel was first employed, and to determine what impression was left upon the minds of those who actually discovered it.

The succession of events leading up to the discovery of the Beagle Channel and the manner in which those events were recorded by Fitzroy are as follows: —

March 2nd–March 14th 1830. Mr. Murray, the master, left the ship anchored near Waterman island, and passed up Christmas Sound into the SW'n arm of the Beagle Channel. He returned to the ship on the 14th, and Fitzroy speaks of the discovery in the following manner. (Narrative Vol. 1. p. 417).

"Mr. Murray penetrated nearby to the base of the snow-covered mountains, which extend to the eastward in an unbroken chain, and ascertained that there are passages leading from Christmas Sound to the large bay where the whale-boat was stolen; and that they run near the foot of the mountains. He also saw a channel leading farther to the eastward than eye-sight could reach, whose average width seemed to be about a mile. He left the two children in charge of an old woman whom they met near the westernmost part which his party reached, who appeared to know them well, and to be very much pleased at having them placed in her care".

April 6th–14th 1830. Mr. Murray again left the vessel, which was anchored in Orange Bay, and proceeded to the Northward in the cutter: he entered the Beagle Channel through the Murray narrows, passed up it to the eastward as Gable islands, and then returned to the ship.

Fitzroy describes this further exploration of the newly-discovered channel as follows. (Narrative Vol. 1. p. 429).

"14th. The master returned, and surprised me with the information that he had been through and far beyond Nassau Bay. He had gone, very little to the northward, but a long distance to the east, having passed through a narrow passage, about one-third of a mile wide, which led him into a straight channel, averaging about two miles or more in width, and extending nearly east and west as far as the eye could reach. Westward of the passage by which he entered, was an opening to the north-west, but as his orders specified north and east, he followed the eastern branch of the channel, looking for an opening on either side, without success. Northward of him lay a range of mountains, whose summits were covered with snow, which extended about forty miles, and then sunk into ordinary hills that, near the place which he reached, showed earthy or clayey cliffs towards the water. From the clay cliffs his view was unbroken by any land in an ESE. direction; therefore he must have looked through an opening at the outer sea. His provisions being almost exhausted, he hastened back".

May 4th–May 10th 1830. Mr. Stokes, midshipman, was sent away from the vessel, which was anchored in Lennox Cove at the time, with orders to explore the Eastern entrance to the Beagle

Channel. His tracks on the outward and return trips are unknown. The soundings inserted on the fair chart, which was drawn up from these results of these explorations of the region under discussion appear to show that Midshipman Stokes' tracks was approximately as shown on the chart cutting attached. The reason for this conclusion is, that, from the evidence available, it does not appear possible that the soundings in question should have been taken on any occasion but this one. Captain Fitzroy refers to the trip in the following laconic fashion; (Narrative Vol. p. 449).

"Soon after the Master came alongside, Mr. Stokes also returned, having been a long way into the channel first discovered by Mr. Murray, and having examined all the shores about its eastern communication with the sea. He met many groups of Indians, but managed so as not to have any collision or trouble with them".

May 7th–10th 1830. Fitzroy, having left the vessel at Lennox Cove, passed round the South and Southwestern shores of Navarino Island, entered Beagle Channel, and explored it to the westward as far as point Divide. His description of this trip is given [in] the Narrative Vol. 1. p. 439, in the following terms.

"7th. Soon after we set out, many canoes were seen in chase of us, but though they paddled fast in smooth water, our boat moved too quickly for them to succeed in their endeavours to barter with us, or to gratify their curiosity. The Murray Narrow is the only passage into the long channel which runs so clearly east and west. A strong tide sets through it, the flood coming from the channel. On each side is rather low land, rising quickly into hills, behind which are mountains, those on the west side being high, and covered with snow".

At the conclusion of these boat expeditions Fitzroy considered the Beagle Channel to be completely surveyed and explored from its eastern entrance to Christmas Sound; and the descriptions of the Channel made later on by Captain King were based solely upon the reports of these explorations.

It is therefore unnecessary to examine all the references to the Beagle Channel contained in the Narrative of the second expedition, of 1831-1836; for such allusions are only inserted to make the narrative of events continuous, and no longer assist in giving a correct geographical definition to the waterway.

The best proof of this assertion is contained in the fact that the descriptions of the Beagle Channel in the Sailing Directions drawn up on the results of the first, and of the second, voyages, are identical.

The extracts made from the Narrative shew generally, that the discoverers were impressed by the straightness, and the narrowness of the channel; whilst the Narrative for April 4th, 1830 shews, in addition, that they regarded the *eastern opening of the channel as being partially visible from Gable Island.*

This fact is regarded as of great significance, and attention is particularly drawn to it.

After the run of the two vessels to England, Captain King drew up an accurate report of the discoveries made, and forwarded it to the Admiralty with his letter of proceedings, dated 15th October, 1830, Plymouth Sound. In this document, which is in the custody of the Public Record Office, he speaks of the newly discovered channel in the following terms.

"*Beagle Channel.* Among the most remarkable features of this survey is a channel leading in almost a direct line between Cape San Pío and Christmas Sound, one part of which is within 25 miles of Admiralty Sound".

This sentence describes the form and limits of the Beagle Channel, and would appear to be decisive even though no other evidence existed; but it is still necessary to examine

the texts of those other works in which King and Fitzroy defined the waterway, in order to ascertain that they did not subsequently modify their original opinions.

In the lecture delivered by Captain King before the Royal Geographical Society in 1831, the leader of the first expedition described the Beagle Channel in terms almost identical to those wich he employed in his letter to the Admiralty. "The South Shore, or seaward coastline, is principally of greenstone, excepting the shores of the Beagle Channel, which extends from Christmas sound to Cape San Pío, a distance of one hundred and twenty miles, with a course so direct that no points of the opposite shores cross and intercept a free view through, although its average breadth which is also very parallel, is not more than a mile, and in some places only a third of a mile across."

In the "Sailing Directions for the coasts of Eastern and Western Patagonia" by Captain Philip Parker King 1832, the author describes the Beagle Channel in the following terms:

P. 103

> "*To the north of Lennox Island is the eastern opening of the Beagle Channel.* It is easy of access, but useless to a ship. Boats may profit by its straight course and smooth water. It runs one hundred and twenty miles, in nearly a direct line between ranges of high mountains, covered always with snow. The highest are between three or four thousand feet above the sea. This channel averages one mile and a half in width and in general has deep water; but there are in it many inlets, and rocks near them".

It must be admitted that the words which state that the eastern entrance of the Beagle Channel as lying to the North of Lennox Island are somewhat ambiguous.

It is stated, on page 1 of the book that "all bearings not otherwise distinguished are corrected for variation are true", so that the words "to the North of Lennox Island" might be construed in the sense, that the eastern mouth of the channel lay on a bearing, drawn accurately North (true) from Lennox Island; that is to say, it would run between Picton and Navarino Islands.

So rigorous a construction of the phrase hardly commends itself, however; firstly, because the eastern mouth so described could never have been visible, or even partially visible, from Gable Island, as it was stated to be in the Narrative for April 4th 1830; and secondly, because, if the eastern mouth ran in a Southerly direction between Picton and Navarino Island, it could not be reconciled with the straight, *east and west* course, of the waterway, so clearly described in the earlier statements of Fitzroy. It is therefore preferable to infer that the words "to the North of Lennox Island" mean no more than "a general northerly direction"; but, as the substitution of this phrase for that actually in the text would still leave doubt as to the exact position of the eastern mouth, it is necessary to refer to the descriptions given to it by the explorers in later editions of the Sailing Directions which they published.

The volume of Sailing Directions published in 1850 by Captains King and Fitzroy in collaboration dissipates the ambiguity.

At the beginning of this it is stated that "In this work the bearings are all magnetic except where marked as 'true' " whilst, on page 167, the eastern mouth of the Beagle Channel is again stated to be "to the north of Lennox Island", and the description of the form and limits of the waterway is identical with that of the earlier edition.*

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* *Sailing Directions for South America, Part 11 by Captains Philip Parker King and Robert Fitzroy 1852, at page 167:* —

> "To the North of Lennox Island is the eastern opening of the Beagle Channel. It is easy of access, but useless to a ship. Boats may profit by its straight course and smooth water. It runs 120 miles, in nearly a direct line between ranges of high mountains, covered always with snow. The highest are between 3,000 and 4,000 feet above the sea. This channel averages 1 1/2 miles in breadth and in general has deep water, but there are in it many inlets, and rocks near them."

This manner of describing the Beagle Channel, its shape, its extent and its eastern entrance may be regarded as an expression of the final opinions of the first explorers, since the 3rd and 4th editions, both published by Fitzroy, contain no alteration in wording. If, therefore, we apply to the description of the Beagle Channel given in the second edition, the principles of argument under which the first was examined, we can only conclude, that, in the final opinion of the discoverers, the eastern mouth of the waterway lay to the north (magnetic) of Lennox Island, the variation at the date in question being about 20° E.

If, at this point, a summary be made of the evidence which has been reviewed, it must be concluded that the Beagle Channel alluded to in the Narrative, and described by Captain King in his letter of proceedings, his lecture, and his sailing directions, is the waterway which has been tinted in blue on the attached chart cutting, whilst its eastern entrance must be regarded as the stretch of water between the coast of Tierra del Fuego to the west of Cape San Pío, and the northern shores of the New and Picton Islands. Any other conception of the channel would be at variance either with the straightness of its traject, upon which the first explorers insisted so frequently, or with the eastern and western limits which they defined with such precision.

Attention should now be drawn to a statement already made, that the second edition of the Sailing Directions may be regarded as the final expression of the ideas of King and Fitzroy on the limits and form of the Beagle Channel. The two subsequent editions (3rd and 4th) were, it is true, prepared by Fitzroy, but they merely repeat the geographical definition of the Eastern mouth already made in the second edition. All subsequent editions were prepared by other persons, and cannot therefore be regarded as original, and authoritative documents. For this reason, it is not intended to include in this Memorandum an examination of the definitions given to the Beagle Channel in editions of the Sailing Directions, which have succeeded the one published in 1850, for it is considered that such an investigation would be outside the scope of this enquiry, which is concerned primarily with the opinions and statements of the first discoverers.

Having now examined all the descriptions of the Beagle Channel made by King and Fitzroy, it would be easy to propose a geographical definition, which should describe that waterway, in a manner conformable to the opinions of those who first discovered it.

Before doing this, however, it has been thought necessary to make an investigation, similar to the preceding one, with regard to Moat Bay, now known as Moat Channel, and to discover if possible how Fitzroy and King would have described the form and limits of that configuration.

This second examination cannot be conducted as rigorously as the one just concluded, because Moat Bay although shown on their original chart is not mentioned in any report or description of the locality made by King or by Fitzroy. Another obstacle to a satisfactory solution of the question consists in the fact, that it would appear that the name of Moat Bay must have been given to that feature during the boat expedition of Midshipman Stokes to the eastern mouth of the channel in May, 1830, and that expedition is only referred to in the briefest manner by Fitzroy.

The only document, which can be stated with certainty to express the ideas of, Fitzroy and of Stokes on the point at issue is the fair chart of the locality, drawn in 1831, at the conclusion of the first expedition, and the attached tracing of the eastern mouth of the Beagle Channel has been taken from that source.

An examination of the manner in which the name Moat Bay has been placed with respect to the neighbouring shore line, and to the central line of the channel, leads to the conclusion that, it was intended to designate as Moat Bay, the bend which occurs in the coast line between Cape San Pío and the Woodcock Islands.

This opinion is strengthened by an examination of the first edition of Admiralty Chart No. 1373, where the name, although brought more towards the centre of the channel, is still drawn on a curve which is nearly parallel to the shape of the Bay.

A less elaborate, but equally certain method of arriving at the same conclusion, is afforded by the reflection that Fitzroy can never have intended to give the name Moat Bay to an open channel; and that the only feature in the locality corresponding to the accepted notion of a bay, is the one described.

All the relevant passages from the manuscript reports and the published works of Captains King and Fitzroy have now been quoted and examined, and it is reasonable to conclude on the basis of the available evidence:

I. That the Beagle Channel as conceived by its first explorers is a narrow channel, about 120 miles in length running between Capes Kekhlab, on the Eastern side of Cook bay, and Cape San Pío.

II. That the feature now shewn on the Charts as Moat Channel should really be termed Moat Bay, which should be regarded as lying between Moat Point, on the East, and a round, unnamed point 8 miles to the West of it.

These conclusions make it fairly certain, that, the words in Article 3 of the boundary treaty of 1881 "islands to the South of the Beagle Channel", include Picton, New, and Lennox Islands, which in the opinion of this Department, belong to Chile.

Having thus formulated the conclusions of the preceding investigation, a few words should be added in explanation of the arguments that might be brought forward to combat the view which has been taken.

The statement in the Admiralty Sailing Directions for 1852, that the Eastern mouth of the Beagle Channel lies to the "North (magnetic) of Lennox island", is not wholly satisfactory, and it might be maintained that this definition does not preclude the possibility of including the passage between Picton and Navarino islands within the eastern opening.

This argument is strengthened by the reflection that, in the 5th edition of the Sailing Directions, published in 1860, the editor, Mr. Hull (Master) certainly held that opinion. His description of the Eastern mouth has in fact been the basis of the claims of the Argentine Government, and was worded as follows: "Its eastern entrance lies to the NW. of Lennox and New Islands on either side of Picton Island".

Whilst admitting the feasibility of such a standpoint, it must be added that it is seriously weakened by other considerations.

I. Mr. Hull was not an original explorer of the channel, and his alteration of the original description of the Eastern mouth, made by the discoverers of the Channel, cannot be regarded as authoritative.

II. The description given by him was abandoned in the next edition of the Sailing Directions and has not since been revived.

III. If the passage between Picton and Navarino Islands be regarded as part of the Beagle Channel, that waterway no longer possesses the feature of straightness, so frequently alluded to by the first explorers.

IV. The inclusion of the above passage in the Beagle Channel gives it two eastern openings, or more properly, an eastern and a south-eastern one; whereas King and Fitzroy distinctly allude to only one, by referring to it in the singular.

V. The opinion of impartial geographers cannot be neglected, and the writers of the best-known geographical works of the 19th and 20th centuries appear unanimous in regarding the eastern opening of the Beagle Channel in the manner described in the general conclusions of this memorandum. It must be admitted, however, frankly, that, at the present moment, the Admiralty Charts and Sailing Directions have, in some respects, departed from the definition originally given to the Beagle Channel by King and Fitzroy.

It has been stated, however, that these departures from the texts of the original authors are not geographically admissible; and, if no diplomatic questions were involved, the mistakes could and would at once be admitted and rectified. But, as the present

mis-statements, or ambiguity, of the Admiralty publications lend some colour to the arguments now advanced by the Argentine Government, it would appear as though the British Government had already decided in favour of the Chilean Republic, if the errors in question were now rectified; for such corrections could only be made upon the Admiralty Charts and Sailing Directions, and their appearance would mostly certainly be noticed by such technical experts as are at present advising the Argentine and Chilean Governments.

The Admiralty is therefore faced with the problem of whether it would be better to allow the existing ambiguities in its publications to stand, or to incur the charge of partiality by correcting them. The opinion of the Foreign Office upon this point would be of value.

J. F. PARRY
Hydrographer.

No. 10

LETTER, THE UNDER-SECRETARY OF STATE FOR THE BRITISH FOREIGN OFFICE TO THE SECRETARY OF THE BRITISH ADMIRALTY, 14 JANUARY 1919

Foreign Office S.W.1.
January 14 1919.

213077/2.A.

Sir:

With reference to your letter No. M.46549 of the 28th ultimo, I am directed by Earl Curzon of Kedleston to request you to thank the Hydrographer of the Navy for his memorandum on the Beagle Channel, which has been read with interest.

With reference to the last paragraph of the memorandum, I am to state that His Lordship would deprecate any change in the charts and sailing direction at the present moment.

I am,
Sir,
Your most obedient
humble Servant,
(*Signed*) R. GRAHAM

ANNEX IIA

Paragraphs 14-16 (pp. 287-291) of the Argentine Reply
(See Decision, paragraph 89 (*c*))

The Memoranda of the British Hydrographic Department of 1918 and the opinion of Sir Thomas Holdich

14. Much has already been said in the *Argentine Memorial*[37] and *Counter Memorial*[38] on the value of the opinion expressed by the British Hydrographic Department in its Memorandum of 6th July, 1918; nevertheless, the *Chilean Counter Memorial*[39] insists in giving to this document a decisive relevance. It is therefore necessary to return briefly to this subject to emphasize certain important features of this document.

Mr. Bell is not only promoted by the Chilean Government to the rank of authoritative interpreter of the geographical and historical meaning of the Beagle Channel, but also as a better authority on the Beagle Channel than Fitzroy himself! Mr. Bell was probably never

[37] I, pp. 75 ff.
[38] I, pp. 354 ff.
[39] I, pp. 92 ff.

in the area; he relies on King—who certainly was never there—and interprets the "Narrative" 's entry for 4 April 1830[40] freely in order to adjust it to his own pre-conceptions.

Actually, the argument used by Mr. Bell against Master Hull's definition of the eastern entrance of the Beagle Channel in the 1860 edition of the Sailing Directions, can be used against his own Memorandum, since, as he says of Mr. Hull, neither Captain King nor Mr. Bell were the "original explorer of the Channel"[41].

The Memorandum of July, 1918 cannot be considered as a serious alternative interpretation of Fitzroy, not only because of Mr. Bell's very doubtful conclusions, but also because they were quite obviously much influenced by Guerra's book; and were certainly not founded on a careful perusal of all of Fitzroy's original documents.

The Chilean Government considers this Argentine view "gratuitous" and "offensive", but it is difficult to see what is so offensive about drawing attention to a fact. And it can hardly be "gratuitous" in view of Mr. Bell's own words in the opening of his Memorandum of July 1918[42]:

> "*The translation of Dr. Guillermo Guerra's book* upon the Chilean claims over Picton and New Islands, in the eastern mouth of the Beagle Channel, *is submitted.* The work consists of a long and detailed discussion of the geographical and legal aspects of the question; and *no summary of its contents could be anything but inadequate*". (Emphasis added)

After which it is hardly surprising to read at the end of his Memorandum:

> "V. The opinions of impartial geographers cannot be neglected and the writers of the best-known geographical works of the 19th. and 20th. centuries appear unanimous in regarding the eastern opening of the Beagle Channel in the manner described in the general conclusions of this memorandum. (*See Guillermo Guerra's book Chapter 3*)" (Emphasis added).

15. Mr. Bell's internal Memorandum of July 1918 was copied in full by the British Hydrographer, J. F. Parry, when preparing his Memorandum in December of that same year. Nevertheless, there are some *nuances*:

(*a*) Parry must have been aware of the true bearing noted by Fitzroy in the first edition of the Sailing Directions: "to the north of Lennox Island is the eastern opening of the Beagle Channel" but preferred the later, second edition which wrongly quotes a magnetic bearing, possibly in order not to contradict Bell[43].

(*b*) He further confused the matter by repeatedly referring to Fitzroy and King as the "first explorers of the Beagle" and listing the greater part of the original documentation in a way that the reader might have been led to suppose that King was himself the explorer and surveyor of the Channel.

(*c*) He rejected Darwin's opinion, although Darwin was on board the "Beagle" with Fitzroy, wrote Volume III of the "Narrative" and, it will be allowed, must have had not inconsiderable powers of observation, and took King instead[44].

(*d*) He stated, in 1918, that "modern practices in navigation" are inadmissible considerations in the case.

(*e*) He added a synopsis of the historical and diplomatic background to the question where it is said, for instance, that the 1893 Additional and Explanatory Protocol "was intended to give precision to certain provisions of the earlier Treaty"[45].

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[40] The *Chilean Counter Memorial* I, p. 92, by a printing error quotes "April 4th, *1839*".
[41] *Chilean Counter Memorial* II, Annex 373.
[42] *Chilean Counter Memorial* II, Annex 373.
[43] See *Argentine Memorial* I, p. 95.
[44] *Chilean Memorial* II, Annex 121.
[45] *Ibid.*, Annex 122, p. 300.

To summarize then, the originally partial view of Mr. Bell was merely taken by Mr. Parry, and enlarged with a historical introduction and a final *caveat* as to the responsibility of the Admiralty for ordering any changes in the British charts and Sailing Directions.

16. It is respectfully submitted to the Court that, if it is indeed desired to canvass the state of opinion within the British Government—when it was at the very edge of being asked to play the role of arbitrator—on the Beagle Channel question, it is proper at least to take in also, besides, the advice emanating from Sir Thomas Holdich.

Sir Thomas Holdich was *first* asked by the Foreign Office to submit his views on the question of the Beagle Channel, well before the Office addressed a letter to the Hydrographer and for the following reasons:

—He was *the Chief Commissioner on the Argentine-Chile Boundary Commission* of 1901-3.

—*He personally navigated the Beagle Channel* on board the Argentine gunboat "Patria" in 1903.

—He was the President of the Royal Geographical Society and author of "The Countries of the King's Award".

Sir Thomas Holdich, as well as the Hydrographer and Mr. Bell, knew Professor Guerra's book, although Holdich only mentioned it as a good source for historical references in one paragraph of a letter, strongly to discard the value of historical references to the Beagle Channel question in the next[46].

It has been seen above (para. 15) that one of the differences between the Hydrographer's opinion and the internal note prepared by Mr. Bell is that the former in the Minute with which he transmits his Memorandum to his Admiralty superiors rejects Holdich's statement that "modern practices in navigation" have to be considered in connection with the Beagle Channel Case[47]. But the point is that the Hydrographer rejected Holdich's idea of the value of "modern practices in navigation", yet it was solely on these considerations that Holdich rested his thesis of a Channel with *two mouths*, allowing the line Cape San Pío–Picton Island as one of the two. The only significant historical reference that Sir Thomas Holdich incorporates in his text is one that comprises the Argentine thesis:

> "That to the west of the island [Picton] is the one [entrance] to which Darwin refers in his 'Voyage of a Naturalist round the World' *as connecting the Goree Roads* (where the *Beagle* was anchored) *with the Channel*". (Emphasis added)[48].

Holdich then, although disregarding in general the historical references, does recognize the undeniable fact that for Darwin the eastern entrance was situated between Picton and Navarino. He then, *on the basis of the needs of modern navigation*, says that the other sea area to the north of Picton is another entrance.

Moreover, Sir Thomas Holdich foresaw the roots of the strategic and security problems that surely influenced the minds of the negotiators and which lie at the basis of the Beagle Channel question. Indeed, he accurately perceived—after recognizing the needs of

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[46] See letter of Sir Thomas Holdich to the British Under-Secretary of State for Foreign Affairs, 30.ix.1918, in *Chilean Memorial* II, Annex 119: "Whether it was so regarded when the treaty of 1881 between the Chilean and Argentine Governments was made is only to be decided by historical references, which can be readily made if necessary (they will be found in 'La Soberania Chilena en las islas al sur del Canal Beagle', published at Santiago de Chile in 1917), but I am strongly of opinion that it is modern practices in navigation and not historical references which should weigh most deciding a dispute of this nature".

[47] See *Chilean Memorial* II, Annex 121.

[48] *Ibid.*, Annex 119.

modern navigation—the permanence of an historical fact as important and decisive as the historical evidence. He said in his letter:

"Undoubtedly Argentine interests prevail in the Beagle Channel"[49].

ANNEX III

Sea traffic to and from the eastern Beagle Channel region

(Decision, paragraph 97)

1. In the course of the oral hearings (specifically on September 17, 1976), after a few preliminary remarks, the following question was put by a member of the Court to Counsel both for Argentina and Chile (Verbatim Record, VR 12/7 at p. 172 of the English version):

> "To come to the point, the precise question is this: can the Parties supply the Court with information as to the tracks followed by vessels entering the Beagle Channel from the direction of Staten Island or, as the case might be, from the direction of the Wollaston or Hermite Islands; and similarly, as regards the vessels leaving the Channel and going in either of these directions. It would be appreciated, also, if so far as possible, approximate numbers of ships, dates or periods concerned could also be indicated."

2. In the preliminary remarks, it was explained that the enquiry had to do with the customary track of vessels "... in the period roughly covered by the negotiating process preceding 1881 and the period shortly thereafter", —and attention was directed to various voyages in the period 1848-1886 referred to by the Parties in the written pleadings and oral hearings. The specification of a brief period *subsequent* to 1881 was included on the assumption that what was customary at that time was not likely to diverge significantly from what it had been earlier, and that in consequence, it was likely to throw light on contemporary understandings as to the usual course of entry into, or exit from, the Beagle Channel. This seemed justified even though Ushuaia, as the key destination point, was not founded until 1884.

3. Admittedly the question posed a challenge to counsel owing to the passage of time, the difficulty of consulting records (especially logs of journeys) and the limited period for additional research. Nevertheless, the response from both Parties was characteristically thorough and helpful. A wide variety of sources, of a reliable kind, were used to plot on sketch maps the courses of particular vessels. Argentina supplied the Court with eight such sketches of which five covered the period 1848-1881 and three the period 1890-1901. Chile supplied thirty-five, of which seven covered the period 1870-1881; sixteen, the period 1882-1891; and twelve, the period 1892-1903. Argentina supplemented its production of sketch maps with an analysis of the navigational aspects of the problem in which stress was placed on the need to understand the relevance of the destinations and purposes of the voyages, and the special problems imposed by weather hazards in the use of sail prior to 1881, as opposed to the use of steam (independently or in conjunction with sail) thereafter (Verbatim Record, VR/25, pp. 113-142 in the English version). According to Argentina the requirement of safe harbours in the days of sail dictated the track[s] of vessels, and it was only after the advent of steam that major use was made of "Moat Bay" (*i.e.* the northern arm) in proceeding to and from points within the Channel, notably Ushuaia, Harberton, Woolya and Almanza, —and in this connexion there is no doubt that Argentinean use of the Channel was more conspicuous than that of Chile.

4. Without attempting an analysis of the tracks of every voyage the following facts may be noted:

(*a*) During the "sailing" period a number of voyages were made which employed the northern arm exclusively, both in entering and leaving the region (*e.g.* the six voyages of the "Allen Gardiner" in 1870-1871).

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[49] *Chilean Memorial* II, Annex 119.

(*b*) On the other hand, there were a few vessels which, on entering the region, appeared to veer south of Nueva Island and then pursue various courses depending on the mission of the voyage (*e.g.* the "Clymene", 1848; the "Dido", 1852). The "Clymene" passed south of Nueva, circled Picton Island, and then took a southern course between Nueva to the east and Picton and Lennox to the west; the "Dido" appeared to track a course south of both Nueva and Lennox Islands, then headed north with Picton on the east before returning to the Atlantic north of Nueva. Another vessel entered the northern arm as far as Picton, then veered south between Nueva and Lennox before returning to Picton (the "Ocean Queen", 1850). The track of the "Allen Gardiner" (rescue mission, 1855) shows entry by the northern arm, a stop at Nueva, then proceeds to Picton, and afterwards south between Nueva and Lennox before heading north between Lennox and Navarino Islands. While the record is not altogether complete, it yet appears that all the vessels whose tracks were made available to the Court, entered the region from the Atlantic seaboard and, with a few exceptions, all left *via* the northern arm.

(*c*) A slight discrepancy exists in the evidence with respect to the route of the "Charrua" (Uruguyan expedition of 1881). According to Argentina it veered south of Nueva before rounding Picton and then heading south. According to Chile it veered south of Picton. Both agree that it left the region *via* the northern arm.

(*d*) It may be assumed that the passage between Navarino and Lennox Islands (the southern arm) was used, especially during the "gold rush" era, —but there is no evidence available from the tracks of vessels as to their routing to and from this waterway.

5. Without ascribing too much importance to something that may well be due in part to fortuitous circumstances, it seems that most of the evidence available to the Court indicates that in the period subsequent to 1881 the northern arm of the Channel was almost exclusively used in entering and (with a few exceptions) also in leaving the region on voyages from and to the Atlantic seaboard, and that it was from and to this seaboard that almost all traffic flowed. A few salient examples will be given:

(*a*) In 1885 Señor Félix Paz, Argentine Governor of Tierra del Fuego dispatched a comprehensive report to the Minister of the Interior of Argentina describing his travels and observations. His journey on the "Comodoro Py" took him along the northern arm of the Beagle Channel from Ushuaia past Buen Suceso.

(*b*) Included among the twenty-eight post-1881 sketch maps supplied by Chile, all showing the employment of the northern arm of the Channel in entering or leaving the region are the following:

(i) The routing of the National Transport ships from Buenos Aires. These ships plied the waters without a fixed schedule (Argentine Memorial, Plate 23; Chilean Plate No. 55—1891).

(ii) The routing of the Swedish Expedition of 1895-97 on the "Condor" and "Huemul" (Chilean Plate No. 76—1896).

(iii) The Henry de la Vaux expedition of 1896-97 (Chilean Plate No. 85).

(iv) The expedition of the "Romanche" in 1882, with soundings displaying the use of the northern arm (Chilean Plate No. 33).

(v) The voyages of the "Villarino", the "Ushuaia", the "La Argentina", the "Cleopatria", the "Patria" and many others, including even the voyages of the Argentine training ships for naval cadets, which habitually followed the northern arm of the Channel in entering the region.

6. From all the above, the inference appears justified that, whatever other motives there may have been, the northern arm of the Channel was regarded as the normal route to and from points within the Channel in striking contrast to the passage between Navarino, Picton and Lennox—(and see also paragraph 97 of the Decision).

ANNEX IV

The tracing of the boundary line

(Decision, paragraph 110, —and for additional comments, see paragraphs 103-105, and 108-109)

Sources and modus operandi

1. The documents consulted were the Record of the oral proceedings, VR/25, pp. 183-4, where the Agent for Argentina describes the Channel line; and the letter of 20 September 1976 (No. 131) from the Chilean Agency proposing a division of the islands, islets and rocks between the Parties.

2. The charts consulted were: (*a*), the three put in by the Agent for Argentina at the final session of the hearings—(see VR/25, p. 182), which reproduce the provisional line already indicated on Map 27 to the Argentine Memorial; (*b*) a map consisting of a specially arranged and tinted version of Chilean chart 1307, which proceeded by way of a colouring of the islands to be attributed to the Parties but without showing a line; and finally British Admiralty Charts 1373, 3424 and 3425.

3. However, it is from the second of these groups that the map actually used for tracing the Boundary-Line, namely Chilean chart 1307, on a scale of 1:80 000, has been taken. It has been compared with the Argentine charts of the first group, and various discrepancies have been found in relation to geographic positions, relative positions, and the nature or existence of specific features. In accordance with normal practice the evidence of the Argentine charts has been accepted as to the existence or nature of a feature that lies on the Argentine side of the Channel, and the Chilean chart has been taken as authority for Chilean features. For example, a small islet has been inserted close south of Punta Entrade (meridian 68°30′W. approx.) to accord with the Argentine charts. This islet is also shown on British Admiralty Chart 3425. Similarly, the Chilean depiction of Islotes Solari as an island has been accepted in preference to the Argentine classification of it as a drying reef.

4. The Boundary-Line itself is the resultant of construction lines drawn between opposite, shore to shore, points, sometimes to or from straight baselines. It is in principle a median line, adjusted in certain relatively unimportant respects for reasons of local configuration or of better navigability for the Parties. Over the whole course, account has been taken of sandbanks, siltings etc., which would make a strict median-line unfair, as in the case of certain islets or rocks.

Straight baselines

5. Straight baselines for use in constructing the boundary-line have been drawn as indicated on the Argentine charts between point X and Pampa de Los Indios (meridian 67°06′W. approx.). East of the latter point, straight baselines are shown by firm green lines. Where the Argentine chart ignored Islotes Solari (see above), it has been included here as a basepoint. In general, all those baselines have been omitted that, in the event, have been found to have no effect on the boundary.

6. Between Islas Bridges and Isla Despard, where an equidistant line between basepoints on above-water features would pass too far north in the narrow channel, a notional baseline (shown by a pecked green line) enclosing the shoal water about three-quarters of a mile south-west of Isla Lucas has been used.

Construction lines

7. "Construction lines" are shown as pecked green lines. They indicate in every case the nearest points on the respective baselines which define the equidistant line. These lines are shown in principle wherever the equidistant line changes direction, and so indicate the features which control any section of the line. Where, however, because of the influence of straight baselines (which are comprised of an infinite number of discrete basepoints), the equidistant line is constantly changing direction around another basepoint, a selection of controlling lines only has been shown.

Tracing of the Boundary-Line

8. The position of the terminal point of the Argentine-Chile land boundary (the Isla Grande perpendicular at meridian 68°36′6W. (approx.))—*i.e.* Point X near Lapataia—and of the coastline in its vicinity is markedly at variance between the charts, and therefore that shown on the Chilean chart has been accepted, since otherwise construction of the boundary as an equidistance line in that region would be impossible without re-drawing the coastline. Starting due south at Point X, the line proceeds to a point equidistant from a headland close east of the terminal point and the straight baseline running south-west from Ras Peron. Proceeding eastwards the boundary is a line of equidistance between the straight baselines or the low-water line of coasts and islands, as appropriate and indicated, until it reaches the 100 metre isobath at approximately meridian 68°24′8W. From that point (off the entrance to the Murray Channel) it runs direct (and up to about 400 metres south of a true equidistance line) to a point at approximately meridian 68°10′2W. Thence it continues as an equidistant line to a point north of Bahia Virginia (meridian 67°43′W. approx.). There the line runs straight in an east-north-easterly direction to a position on the leading line that bears 270° from the leading lights on the west coast of Isla Gable, and lies along this leading line until it meets the line indicated by the leading lights situated on Punta Piedrabuena. Thence it runs in a 140° direction along this line, and then in a 100° direction along the leading line formed by the leading lights the front one of which is at Punta Rosales.

9. At a point 1400 metres from the last-mentioned light the boundary turns north-eastwards and runs in a straight line to a point 1100 metres, 294° from the same light, then in a straight line to an equidistant point bearing approximately 332° from the light. Thence it continues as an equidistant line which, east of 67°11′W. (approx.) uses Snipe Island and Islotes Hermanos as Chilean basepoints, and Islas Bécasses as Argentine basepoints, as appropriate. Off the east coast of Picton Island the small Islote Lepper and Isla Reparo have not been used as basepoints for reasons of the kind mentioned in paragraph 4 above, with particular reference to navigability in Argentine waters along the south shore of the Isla Grande.

10. The line ends at meridian 66°25′ West, terminal line of the "Hammer" (see Decision, paragraph 1).

ANNEX V

(See Part I (Report), section D)

Beagle Channel Arbitration

(Argentina vs. Chile)

No. 1

FORMAL OPENING SESSION, ALABAMA ROOM, GENEVA, 7TH AUGUST 1976: INAUGURAL STATEMENT OF SIR GERALD FITZMAURICE, PRESIDENT

Your Excellencies,
Ladies and Gentlemen—

I

We are here today to inaugurate the oral hearing in the Beagle Channel case, and I accordingly now formally declare that hearing open. This case concerns a dispute—the nature of which I shall indicate later—between the Republics—(whom I name in alphabetical order)—of Argentina and Chile. I see before me their Agents and Counsel, and greet them on behalf of my colleagues and myself—members of the Court of Arbitration. This includes also a warm welcome from the Government of the United Kingdom which, I would recall, is—for reasons to be mentioned in due course—formally the Arbitrator in the case, and to whom this Court will eventually transmit its views.

I furthermore welcome the diplomatic or consular and other representatives of the Parties and of the Arbitrator Government, and the representative of the International Labour Organization—and equally, and no less than these, the representatives of the Swiss Confederation and of the Canton and Municipality of Geneva, by whose kindness and co-operation in a number of ways it has been possible for the Court of Arbitration to have its Seat in this city; for the Parties to establish their Agencies here; and, not least, for this formal opening Session to take place in the historic chamber in which we are now sitting, for ever associated with the concept of international arbitration because it was within these four walls that there occurred, a little over a century ago, one of the most famous of all cases of the settlement by arbitral process of a serious dispute between States—a dispute that could otherwise easily have led to war, —the case of the *Alabama Claims* brought by the United States of America against Great Britain.

II

This is obviously not the occasion on which to discuss the *Alabama* case as such, but amongst other things it left two legacies behind it which are not without relevance to our own situation here and now; —*first*, coming when it did, it gave a great impetus to the concept of arbitration as a judicial or quasi-judicial method of settling international disputes, —*secondly*, although the reasons for choosing Geneva as the seat of the tribunal in the *Alabama* case were to some extent fortuitous, there can be little doubt that it furthered the idea of Geneva as an international city—a process that had already started some years previously with the signature of the first of the Geneva Red Cross Conventions in 1864. When I speak of Geneva as an international city, I do not of course mean that it is anything other than a part of the sovereign State of Switzerland. I have in mind simply its unsurpassed record in the promotion of the cause of peace and humanity, of good relations between States, and of the settlement of disputes according to justice and law. As regards the latter, the *Alabama* case of 1872 is far from having been the only occasion on which these premises have been used for such a purpose, —and in that connexion it gives me much pleasure—because of the nationality of two of my colleagues, members of this Court—to recall the quite recent instance of a Franco–United States arbitration that took place in this room some years ago. The tribunal in that case gave its award on 22 December 1963, and for those who are interested a report of it will be found in the *Revue Générale de Droit International Public* for 1965, from p. 189 onwards.

III

As regards the process of international arbitration, which the *Alabama* case helped to promote, I should like to say a few words about that before I come to our own case. Once again this is not the occasion on which to embark upon a history of the subject, and of the various forms that arbitration between States has taken in the past, —entertaining and instructive though that might be; —for today there are, in practice, only two ways in which States can obtain a *judicial* settlement of the legal differences that may arise between them—if it is such a settlement that they desire, —namely to submit the dispute either to a tribunal set up by themselves jointly, or else to a standing international tribunal whose jurisdiction extends to the subject-matter concerned, —in short, and for all practical purposes, either an *ad hoc* specially set up tribunal, such as our own Court of arbitration here, expressly constituted for the particular case, and for that case alone, or else a pre-existing standing tribunal such as the International Court of Justice at The Hague, empowered to deal with any cases referred to it that are within the scope of its jurisdiction.

It is not my intention here to discuss which of these two methods is the more to be preferred. In the international field, both have their place and their utility. What matters is that—for the settlement of legal disputes—States should have recourse to one or other of them as a means of solution. This is what the Parties to the present case—greatly to their credit—have done and, as I shall mention later, not for the first time. Why does it not occur more frequently? Certainly not for any lack of legal disputes between States: these abound. The reasons for the reluctance of States in this area are many and various. I have elsewhere and more than once indicated what, in my view, are the main ones, and I will

not repeat them now. What I want to stress is that whatever these reasons may be, the fault does not lie in anything inherent in the international arbitral or judicial process itself. Of course the proceedings are long, because as a rule the disputes involved are long-standing and complicated, and the tribunal and the Parties need time in which to present and hear them, and to come to a properly deliberated conclusion. Of course they cost money, but not unduly so compared with other items of a national budget. Doubtless also, there may be defects of procedure in the practices and methods of international tribunals, but what national or municipal court is perfect in that respect? Finally, the outcome of the case, the decision of the tribunal, cannot, or at least seldom does, please everybody—but this is inseparable from the judicial process everywhere, whether in national or international courts. None of these elements, considered either singly or cumulatively, affords an adequate justification for failing to have recourse to international arbitration or adjudication where that would otherwise be the natural step to take. In such circumstances, appeal to one or more of these elements cannot avail as anything else but a pretext for a reluctance grounded essentially in government policy in respect either of the particular dispute or—alas all too frequently—of the international judicial process as such.

In saying all this, I am not blind to the difficulties of governments in this matter. It is not for nothing that two of my colleagues on this Court and I myself also, were for many years jurisconsults in our respective Ministries of Foreign Affairs. We know what goes on. My concern is simply that responsibility for what really results from the attitudes—possibly the quite understandable attitudes—of governments, should not be laid at the door of the international judicial process, where it does not belong. I believe that if the international community could rid itself of its many illusions in this sphere, it would become easier to see where the true obstacles lie, and easier to embark upon those courses that might, in the fullness of time, provide a solution.

IV

I come at length—and it is time I did so—to the present—*Beagle Channel*—arbitration, which is, so to speak, now safely before this Court. How has it got here? As to this, and other things that I shall have to say about the case, I must ask the indulgence of those of you who are familiar with it, if, for the benefit of others, I refer to much that you will already know about.

By Article III of the Treaty of Santiago, signed on 22 May 1902—(a Treaty which is now no longer in force, but which was still in force when this case was originally brought before our Court)—the Parties—the Republics of Argentina and of Chile—nominated His (now of course Her) Britannic Majesty's Government to be the Arbitrator in any dispute between them that might be referred to arbitration under the other provisions of the Treaty. This succeeded to an earlier treaty of 1896 which has conferred a similar function on Queen Victoria's Government. This type of arbitration, namely by reference to a single Head of State, or his or her government, was very common in the 19th century; but, partly under the impulsion of the *Alabama* case, was being increasingly replaced by the modern system of a reference to a *court* of arbitration, or arbitral tribunal, composed of several members of different nationalities. In any event, in all the boundary disputes such as the present one, that have been referred to arbitration under these Argentine-Chilean Treaties, the Arbitrator—the British Government—has seen fit, with the concurrence of the Parties, to appoint an arbitral tribunal to examine the matter and report to it accordingly. Thus, for the boundary arbitration that took place in London between 1898 and 1902, the tribunal consisted of Lord Macnaghten, one of the English Law Lords, as President, with General Sir John Ardagh and Colonel Sir Thomas Holdich as the other members, both of them distinguished geographers, and Sir Thomas Holdich also a military engineer. This arbitration, because it left certain points unresolved or in doubt, led many years later, in 1965-1966, to another one (the *La Palena* case as it is often called), again held in London, with the tribunal consisting of the late Lord McNair as President, and two expert geographers, Mr. L. P. (now Sir Laurence) Kirwan and Brigadier Papworth, as the other members. In both these cases, it will be observed, the members of the tribunal were all of the same nationality, which was also that of the Arbitrator government, and only one of them was a jurist.

In the present case, there are certain notable differences, much more in line with modern tendencies. We—that is to say my colleagues and I—are all of different nationalities; only one of us, myself, has the nationality of the Arbitrator Government; and we are all jurists. But the fact that, at the date of our appointment, we were all members of the International Court of Justice at The Hague, and that two of us still are, is entirely fortuitous. We were selected for such personal qualifications as we may individually possess, not as members of the International Court, —and it is in our personal capacity alone that we function. I would like to stress that.

V

All these disputes, including the present one, had and have their ultimate origin, or perhaps more correctly cause, in a Treaty of 23 July 1881, between Argentina and Chile (of which we shall hear much in the coming weeks) the object of which was to define the boundaries between the two countries. Like so many treaties however, it involved uncertainties and obscurities that, in default of agreement between the Parties could, in the long run, only be settled by reference to some form of international adjudication. But whereas the earlier arbitrations I have mentioned concerned the boundaries along the chain of the Andes, this one relates to a much more southerly area, not far from the tip of the continent where the territories of the two Parties converge, namely the region of the Beagle Channel, which is a narrow channel running in a general east-west direction and connecting the Atlantic and Pacific Oceans. This Channel has romantic associations for two reasons. *In the first place*, it is named after the British naval survey vessel "Beagle" from which it was seen in 1830 and which is popularly known as "Darwin's ship" because, on a later voyage, it carried the celebrated naturalist Charles Darwin on his voyage round the world in the course of which he gathered the materials for his great work "The Origin of the Species", and for the theory of evolution by "natural selection".

Secondly, —and perhaps of greater interest to our Latin-American friends—is the fact that the Beagle Channel constitutes one of the very few examples of what the old Spanish and Portuguese explorers were always looking for—what they called "El Paso"—a channel, strait, river, or waterway of some kind, that would connect the two great Oceans, the Atlantic and the Pacific. There are only three such waterways in the Latin-Americas. The most northerly is the Panama Canal which is man-made and must therefore, presumably, from the standpoint of romance, be discounted, although we can follow the English poet Keats, who, on first reading Homer, felt constrained to place himself in imagination with Cortez at some point on the Isthmus of Panama from which perhaps, on a clear day, both Oceans could be seen, and to utter these immortal lines which have always seemed to me to embody all the wonder of the discovery of the Americas,

> "Then felt I like some watcher of the skies
> When a new planet swims into his ken;
> Or like stout Cortez, when with eagle eyes
> He stared at the Pacific—and all his men
> Looked at each other with a wild surmise—
> Silent, upon a peak in Darien."

The second example, and first discovery of "El Paso", was the Straits of Magellan, the narrow Atlantic entrance to which was found—indeed virtually stumbled upon—in 1520 by the Portuguese explorer Fernando de Magallanes, in the course of the first circumnavigation of the world. Then, approximately 300 years had to elapse before the existence of the third—(at the time the second)—"El Paso" was definitely established, in the shape of the Beagle Channel. It is not surprising that this remarkable, and rather mysterious seaway, much of which could almost have been man-made, should have aroused great interest.

VI

But now we must, for the time being, leave the coasts of romance, and return to the more mundane, if most mellifluous, shores of the Lac Léman, where we shall be remaining until the case is finished. I shall not go into the back history of the dispute from

the date when it first arose or began to arise, possibly some ninety years ago—for that history belongs to the substance of the case which we shall be considering during the weeks to come. But it *is* part of my function, on an occasion such as this one, to describe briefly the procedural steps that have led up to the oral hearing on which we are now embarking. Negotiations, which had been going on for a considerable time, led to the signature in English and Spanish, on 22 July 1971, and on behalf of the two Parties and of the Arbitrator, Her Britannic Majesty's Government, of the "Special Agreement" or "*Compromiso*" setting up this Court of Arbitration and defining its terms of reference. Accordingly, I will now ask the Registrar, Professor Philippe Cahier, to read those parts of the *Compromiso* that are of primary relevance and importance for understanding the nature of the case and the situation of this Court, —namely the Preamble and Articles I-III inclusive, IX, and XII-XVII inclusive. He will do this in a French translation. The official texts are of course in English and Spanish, both being equally authoritative: —

. . .

. . .

As regards the subsequent steps in the procedure, after the signature of the *Compromiso* in 1971, I propose to go over these very rapidly. From time to time the Court has held informal meetings with the Agents and Counsel of the Parties to settle various procedural points that arose. It has also issued a series of Orders, establishing the seat of the Court here in Geneva, appointing the Registrar, and fixing time-limits for the filing of the various written pleadings of the Parties and the annexed documents in the case. On two matters of considerable importance the position has been left in some sense open. *First*, the Court has not adopted any definite written rules of procedure. With the approbation of the Parties, it simply laid down for itself in Section II of its Order of 10 June 1972, the following general principle, namely that the Court would

> "with such adaptations as the particular circumstances of the present case may require, be guided by the rules and practices customarily applied in modern arbitral proceedings".

A further clause provided that either Party could at any time bring before the Court any question of practice or procedure, and that the Court would decide it after consulting both Parties and, if so requested, hearing oral argument from them. So far, these arrangements have worked very satisfactorily, and I have no doubt will continue to do so. The *second* matter to some extent left open was that of language. It has from the start been understood that the basic language of the Court, in which its eventual report, for communication to the Arbitrator, the United Kingdom Government, would be drafted, was to be English, —and the various written pleadings filed by the Parties have been in English. It has been left to them to draw up or exchange with each other such translations as they felt they required. As regards the present oral proceedings, the understanding is that the Agents or Counsel of the Parties may address the Court in either English or French, the Registry ensuring a simultaneous interpretation into the other language; —and here perhaps would be the appropriate moment for me to extend on behalf of the Court our best thanks to the President and Registrar of the International Court of Justice at The Hague for the loan of no fewer than three of its interpreters, thus making it certain that we shall have interpretation of the very highest class.

The system adopted for the written pleadings was that of a *simultaneous* deposit with the Court (and exchange between the Parties) of, first, the Memorials by each of them, and then the two Counter-Memorials, and so on —instead of the more usual "successive" system whereby one Party deposits a Memorial, then the other a Counter-Memorial, followed by a Reply from the first Party and then a Rejoinder by the second. The main reason for this was to avoid either Party seeming to be placed in the position of defendant, and to comply with the spirit of that phrase in Article V of the *Compromiso* which provides that the order in which the written pleadings are presented "shall be without prejudice to any question of any burden of proof".

The various written pleadings were exchanged, as to the Memorials in 1973; as to the Counter-Memorials in 1974; and as to the Replies in 1975. The case would then have been ready for the oral hearing, but in the meantime a question of some moment had arisen, namely the desire of the Parties that the Court, or at least some of its members, should visit the Beagle Channel region, —what is technically known as a *"descente sur les lieux"*—for which the international arbitral and judicial process affords a considerable number of precedents. At first, the Court was reluctant to accede to this request, partly on account of the delay that would be involved, partly because it felt that it was probably already adequately informed on the basis of the written pleadings, which conformed in every way to the highest standards prevailing in such matters, and above all of the splendid series of maps and cartographical notes supplied by each Party, —for all of which I would like to take this opportunity of congratulating and thanking the Parties in the name of the Court, and of letting them know how greatly it has helped us. However, on account of it, the feeling of the Court was that perhaps a set of photographs of the main features of the Beagle Channel region might suffice, instead of a visit. Nevertheless, in the end, the Court agreed to go, and all of its members participated. We have never regretted it. It would take too long, and exceed any tolerance that I can reasonably expect, and which I have probably already overrun, if I attempted to do anything like justice to an experience that could not have been more interesting and agreeable, both on account of the excellence of the arrangements made, and the overwhelmingly generous hospitality extended to us by the diplomatic, naval and air authorities of each Party; and also on account of the charm of the region and the intrinsic fascination, from the point of view of the case, of seeing everything that we wanted to see and receiving all the information we asked for. Because the occasion involved going about in ships, boats and helicopters, and winter conditions in the region are severe, the visit could only take place in the summer or early autumn months which, in the southern hemisphere, means the period December to April. In fact it could not be arranged before March of this year. I have no doubt at all as to its great utility. Speaking for myself, it was not that one discovered anything startlingly new or unforeseen, but it enabled one to identify with the region, and to visualize its features in a way that only actual looking and seeing can ensure. May I once again thank our kind hosts, on both sides, for affording us this opportunity.

VII

And now I am approaching the end of my task for this morning. In connexion with the oral hearing, in which the Parties will begin their statements tomorrow, the only procedural problem that arose was as to which of them should start. Where the written pleadings have been delivered successively, the normal course is for the side that deposited the first such pleading also to speak first at the oral hearing, in answer to the last of the written pleadings, which will have been delivered by the other side. But where the written pleadings have been simultaneous, not successive, no such automatic solution is possible. Fortunately, in the present case the Parties have been able to agree amongst themselves, and the Court has concurred, that the Republic of Chile shall start—but this is on the clear understanding that Chile shall not on that account be regarded as being in the position either of plaintiff or defendant in the case—and nor will Argentina either; —and it is equally understood that the order of speaking will not in any way prejudice any question of the burden of proof that may arise in this case, should such a question come up. The task of the Court in these proceedings is to decide—on the basis of the requests of the Parties as respectively formulated in Article I of the *Compromiso*—what is the boundary-line in the disputed areas and, as required by Article XII of this instrument, to draw that line on a chart. These tasks the Court will carry out objectively, and to the best of its ability, without preconceptions.

For our working meetings we have been fortunate in securing premises in the new buildings of the International Labour Organization, whose administrative authorities, represented here today by the Deputy Director General, Mr. Valticos, I have much pleasure in thanking. A provisional time-table for these meetings, subject to adjustments and all necessary flexibility, has been agreed between the Court and the Parties with a view to terminating the hearing by about the last week in October. The Court thereafter will hope

to produce its report by about the end of November, but there again there must be flexibility. This concludes my remarks, and I will now give the floor to the Agents of the Parties.

No. 2

VALEDICTORY SPEECH OF THE PRESIDENT AT THE END OF THE ORAL HEARINGS, 23 OCTOBER 1976

My friends, for I know I speak on behalf of all my colleagues here when I say we believe that we can call you that, on both sides. The time has come to bring this part of the case to a close—these oral proceedings in which we have been engaged here for some weeks. This is always rather a solemn and even rather a melancholy moment in the history of an international litigation, especially for those on either side who have laboured so long and so faithfully, for months and even for years on the preparation and presentation of the case, and who now see it pass out of their hands to rest in those of the Court. There is also some sadness for the Court itself. The Court is now left to take difficult decisions on its own without the help and—if I may say so—support so unstintingly given to it by the Parties and by all those who have worked for them, and from most of whom we must now part.

Therefore, may I take this opportunity of thanking all those concerned on both sides, and not only those who have written so well and spoken so elegantly, but also those who—in the background—the backroom boys and girls—have carried out the researches and prepared the documentation and the maps, diagrams, tables and other compilations without which this case would have been hard to assimilate, and which have been of such great assistance to the Court. The role of those who appear as counsel or advocates in these cases is an especially difficult one, for they have always to bear in mind that they have a duty not only to the Party they represent but also to the Court and to the law itself. And these duties may sometimes conflict. In the present case they have been carried out with exemplary fidelity, and highly complex arguments have been presented persuasively but also honestly. The Court is grateful to all those concerned for that.

It has indeed been a complex case, but it has also had the compensating advantage of being an intensely interesting one. Few cases—in the experience of my colleagues and myself as international judges—have exceeded it in that respect. We have learned much and have taken pleasure in much. And, may I say, not least in hearing the sonorities and terms of speech of the noble Spanish language.

The Court now remains here to reach its decision and this will take time. The arguments on both sides are powerful, and the choice between them will be far from easy. The Court will act as conscientiously as it can, bearing in mind the great importance which the outcome will have for both Parties. But here may I, in conclusion, add this: it is one of the more sombre aspects of litigation, and the Court is fully aware of it, that a decision given according to law is in principle bound, unless the circumstances are very exceptional, to disappoint one or other of the Parties. This is a risk they take in advance, together with the obligation of honour as well as of law to abide by the result, whatever it may be.

Now, to end up, I will ask the Agents of the Parties to remain available for consultation by the Court during the coming weeks and possibly even—I do not know—months. And subject to this request and to the delivery to the Registrar of the written statements which I mentioned earlier and regarding which I can give time-limits, if the Parties so desire—that can be done afterwards—subject to all that, I declare these oral proceedings closed. And I say to you, one and all: "Vayan con Dios".

DECLARATION OF HER MAJESTY QUEEN ELIZABETH II, PURSUANT TO THE AGREEMENT FOR ARBITRATION (COMPROMISO) DETERMINED BY THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND SIGNED ON BEHALF OF THAT GOVERNMENT AND THE GOVERNMENTS OF THE ARGENTINE REPUBLIC AND THE REPUBLIC OF CHILE ON 22 JULY 1971 FOR THE ARBITRATION OF A CONTROVERSY BETWEEN THE ARGENTINE REPUBLIC AND THE REPUBLIC OF CHILE CONCERNING THE REGION OF THE BEAGLE CHANNEL[1]

WHEREAS the Argentine Republic and the Republic of Chile (hereinafter referred to as "the Parties") became parties to a General Treaty of Arbitration signed at Santiago on 28th May 1902[2] (hereinafter referred to as "the Treaty");

AND WHEREAS His Britannic Majesty's Government duly accepted the duty of Arbitrator conferred upon them by the Treaty;

AND WHEREAS a controversy has arisen between the Parties concerning the region of the Beagle Channel;

AND WHEREAS, on this occasion, the Parties concurred with regard to the applicability of the Treaty to this controversy and requested the intervention of Our Government in the United Kingdom of Great Britain and Northern Ireland as Arbitrator;

AND WHEREAS Our Government in the United Kingdom, after hearing the Parties, were satisfied that it would be appropriate for them to act as Arbitrator in the controversy;

AND WHEREAS Our Government in the United Kingdom, in accordance with the Treaty and after consulting the Parties separately, determined the Agreement for Arbitration (Compromiso) which was signed on behalf of Our said Government and the Parties at London on 22nd July 1971[3];

AND WHEREAS for the purpose of fulfilling their duties as Arbitrator Our Government in the United Kingdom appointed a Court of Arbitration composed of the following members:

Mr. Hardy C. Dillard (United States of America)

Sir Gerald Fitzmaurice (United Kingdom)

Mr. André Gros (France)

Mr. Charles D. Onyeama (Nigeria) and

Mr. Sture Petrén (Sweden);

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[1] In accordance with Article XIII of the Agreement for Arbitration (Compromiso), the decision of the Court of Arbitration with this declaration that such decision constitutes the Award in accordance with the General Treaty of Arbitration signed at Santiago on 28th May 1902 was communicated to the Argentine Republic and the Republic of Chile by delivery to the London addresses of the Heads of their Diplomatic Missions on 2 May 1977.

[2] British and Foreign State Papers vol. 95, p. 759.

[3] Miscellaneous No. 23 (1971), Cmnd. 4781.

AND WHEREAS, the Government of the Argentine Republic having on 11th March 1972 denounced the Treaty with effect from 22nd September 1972, both Parties stated their understanding, which was shared by Our Government in the United Kingdom, that this would in no way affect the arbitration proceedings in the present case and that the Treaty and the Agreement for Arbitration (Compromiso) would continue in force with respect to those proceedings until their final conclusion;

AND WHEREAS the Parties have presented to the Court of Arbitration written pleadings and maps and other documents;

AND WHEREAS, having heard representatives of the Parties, the Court of Arbitration, accompanied by the Registrar and representatives of the Parties, visited the Beagle Channel region in March 1976;

AND WHEREAS representatives of the Parties took part in oral hearings before the Court of Arbitration between 7th September and 23rd October 1976;

AND WHEREAS the Court of Arbitration, acting in accordance with the provisions of the Agreement for Arbitration (Compromiso), has considered the questions specified in paragraphs (1) and (2) of Article I of that Agreement, reaching its conclusions in accordance with the principles of international law, and has transmitted to Our Government in the United Kingdom its Decision thereon (a copy of which Decision is annexed to this Declaration), including the drawing of the boundary line on a chart;

AND WHEREAS Our Government in the United Kingdom have fully and carefully studied the Decision of the Court of Arbitration, which decides definitively each point in dispute and states the reasons for the decision on each point;

NOW, in pursuance of Article XIII of the Agreement for Arbitration (Compromiso) and in the name of Our Government in the United Kingdom, WE, ELIZABETH THE SECOND, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith, etc., etc., etc., hereby ratify the Decision of the Court of Arbitration and declare that the said Decision constitutes the Award in accordance with the Treaty.

GIVEN in triplicate under Our hand and seal, at Our Court of St. James's this Eighteenth day of April, One thousand Nine hundred and Seventy-seven in the Twenty-sixth year of Our Reign.

ELIZABETH R.

II

EXCHANGE OF DIPLOMATIC NOTES BETWEEN ARGENTINA AND CHILE CONCERNING THE AWARD

ECHANGE DE NOTES DIPLOMATIQUES ENTRE L'ARGENTINE ET LE CHILI CONCERNANT LA SENTENCE

NOTE FROM THE MINISTER FOR FOREIGN AFFAIRS OF THE ARGENTINE REPUBLIC TO THE AMBASSADOR OF CHILE IN ARGENTINA*

Buenos Aires, 25 January 1978

Sir,

I am pleased to inform you, on express instructions from my Government, that the Government of the Argentine Republic, after carefully studying the arbitral Award by Her Britannic Majesty on the Beagle Channel dispute, has decided to declare the Arbitrator's decision irrevocably null and void under international law.

My Government's declaration is contained in the attached document.

The Argentine Republic does not therefore consider itself bound to comply with the arbitral Decision and, consequently, wishes to inform you that it does not and will not recognize the validity of any title that the Republic of Chile may invoke on the basis of the arbitral Award, in order to arrogate to itself sovereign rights over any territory or maritime area.

My Government believes that it is not in the interest of our two Republics to see the quality of our relations impaired by an arbitral decision issued in violation of international law. For this reason, I wish also to advise you that the Argentine Government feels that the most suitable course for finding permanent and definitive solutions, and that most in keeping with our history, is to negotiate bilaterally all the jurisdictional differences between the two countries, as the recent meeting of the Presidents of the two nations, held in the city of Mendoza, demonstrated.

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* Translated from Spanish into English by the Secretariat of the United Nations.

Accept, Sir, the renewed assurances of my highest consideration.

Óscar Antonio MONTES
Vice-Admiral

His Excellency Mr. René Rojas Galdames
Ambassador Extraordinary and Plenipotentiary
Embassy of the Republic of Chile
Buenos Aires

Declaration of Nullity

On 2 May 1977, the Argentine Government was notified of the arbitral Award issued by Her Britannic Majesty, in the dispute between the Argentine Republic and the Republic of Chile concerning the Beagle Channel region, pursuant to the Agreement for Arbitration (Compromiso) of 22 July 1971.

In compliance with the aforesaid Arbitration Agreement, a special Court of Arbitration comprising five current members of the International Court of Justice was entrusted with investigating and ruling on the dispute.

The Decision of this special Court could only be ratified or rejected by Her Britannic Majesty, as formal Arbitrator, as provided in the General Treaty of Arbitration of 1902. Her function was therefore limited to those two alternatives, with no possibility of modifying any aspect of the Decision of the special Court.

The Argentine Government has analysed this Decision thoroughly in the light of the international norms applicable to the procedural and substantive aspects of the dispute. The aforementioned norms are contained in the General Treaty of Arbitration of 1902 and the Agreement for Arbitration reached in 1971.

These legal instruments set down certain requirements which the Decision of the special Court must meet. For instance, the Arbitration Agreement limits the Decision to the geographical area specifically submitted to arbitration (art. I, paras. (1)-(4)), beyond which the Court had no jurisdiction. Furthermore, the 1902 Treaty (art. IX) and the Arbitration Agreement (art. XII (2)) establish that the Decision must rule on each point in dispute, stating the reasons for each ruling. Both agreements also establish that the dispute must be decided in accordance with the principles of international law (art. VIII of the 1902 Treaty and art. I (7) of the Arbitration Agreement). This means that the special Court should have applied the general rules of international law, to both the substance and the procedure, where they were not specifically mentioned in the aforesaid agreements.

From its analysis, the Argentine Government has found that the Decision of the special Court has many serious flaws and has concluded that the Decision was handed down in violation of the international norms to which the Court should have adhered in its task. The Decision

and the resulting Award by Her Britannic Majesty are therefore null and void, since they do not meet the requirements for being considered valid under international law.

The flaws in the arbitral Decision are of different kinds, but are closely linked and have a bearing on each other such as to impair the main arguments on which the operative part of the Decision is based.

These flaws can be grouped into the following six categories:

A) *Distortion of the Argentine arguments*

In several instances, the Decision describes as an Argentine argument something which the Argentine Republic never claimed to the Court of Arbitration, and then rules on this distorted version. This method of distorting a claim and then deciding, not on the real argument but on what the Court says the Argentine Republic claimed, is used even in the consideration of one of Argentina's main contentions.

Thus, Argentina claimed that the eastern end of the Beagle Channel, on the delineation of which the settlement of the dispute largely depends, is, according to the documents drawn up by the discoverers and early explorers of the Channel, situated to the north of Lennox Island, between Picton and Navarino Islands.

The Court of Arbitration, on the other hand, affirms that Argentina claimed as the "real eastern course" one that "departs from the latter's previous general west-east direction and describes what gradually grows into almost a right-angled turn, to pass south and west of Picton Island, between it and Navarino Island, *and thence between the latter and Lennox Island* in what has become a general north-south direction or even (when abreast of Lennox Island) a south-westerly one, *reaching the sea between Punta María on that island and Punta Guanaco on Navarino*" (emphasis added) (para. 4 of the Decision).

This serious distortion of the Argentine position, which ignores the real arguments submitted on the issue, arises again in other parts of the Decision (paras. 51 and 93), influences the entire reasoning of the Court of Arbitration and affects its conclusions on the meaning of the term "Beagle Channel" in the Boundary Treaty of 1881.

The most serious consequences of this distortion appear in paragraphs 93 and 96 of the Decision, where the Court, after discarding other methods as inadequate, seeks to determine what constitutes the Channel of the 1881 Treaty purely by analysing the terms of that Treaty.

In this part of the Decision, the Court rejects the idea of the Channel which it itself attributes to Argentina, asserting that the Treaty could not possibly have used the expression "to the south of the Beagle Channel" to refer to a Channel that, at a given point in its course, bends southwards and continues for a long stretch in a north-south direction.

This conclusion rests entirely on ridiculing the Argentine argument, something which is possible only because the Court had previously distorted that argument.

It is difficult to conceive of a more serious error than that of mistakenly attributing a substantive claim to one of the Parties.

The court also distorts the Argentine position by attributing to Argentina an argument that it never advanced, on the broad meaning of the term "Tierra del Fuego", and ignoring the arguments it actually presented (para. 57), and by stating that Argentina regarded the Picton, Nueva and Lennox Islands as an indivisible whole (para. 7 (*c*)).

These are just some of the more blatant examples of the Court's practice of ruling not on what the Parties to the dispute actually argued but on its own distorted versions of those arguments.

B) *Opinion on disputed issues not submitted to arbitration*

The Court gives its opinion on issues not submitted to arbitration and outside its jurisdiction. For instance, it became clear during the arbitration that a dispute existed between Argentina and Chile over the islands south of the "Hammer", namely, south of the area subject to arbitration (Terhalten, Sesambre, Evout, Barnevelt, etc.), which therefore lay outside the Court's jurisdiction. The Court, however, rules on the status of those islands in some passages of its Decision.

For instance, in paragraph 60 (2 *bis*), in denying the applicability of the Atlantic-Pacific principle of the "Islands clause" of article III of the 1881 Treaty, the Court says that the Treaty awarded Chile all the islands south of the Beagle Channel, whether east or west of Cape Horn, thereby including the islands to the south of the "Hammer". Again, in paragraph 96, in rejecting the concept of the Beagle Channel erroneously attributed to Argentina, it adds a sentence which implicitly condemns Argentina's claim to the southern islands.

It also became clear during the arbitral proceedings that another dispute exists between the Parties concerning the eastern end of the Straits of Magellan. Chile maintains that it has jurisdiction over the entire length of the Straits, while Argentina contends that the eastern boundary of the Straits is formed by a line running from Cape Virgenes to Cape Espíritu Santo and that Cape Dungeness is inside the Straits, with the result that part of the eastern end of the Straits belongs to Argentina. The Court of Arbitration states, in paragraph 31 of its Decision, that the 1881 Treaty gave Chile exclusive control over the Straits of Magellan and, in paragraph 24, says that Cape Dungeness is on the Atlantic, thereby ruling on another question that was outside its competence.

C) *Contradictions in the reasoning of the Court*

Another defect of the arbitral Decision is its contradictions. It is an elementary principle that something cannot be simultaneously affirmed and denied of somebody or something. This is a contradiction and all contradictions are necessarily false. It is also a rule of formal logic that a contradiction cannot be included among the premises of a reasoning,

otherwise any conclusion, no matter how absurd, can then be drawn from that reasoning.

These principles govern the validity of all human reasoning, which naturally includes legal thinking. However, the Court of Arbitration seems to ignore these basic principles and repeatedly contradicts itself, in the process reaching groundless conclusions.

In the first place, the Award manifests an extremely serious logical and juridical contradiction in its treatment of the question of the islands of the Channel. With respect to the section of the Channel extending from Lapataia to Snipe, the Court considers the islands situated there to be "in the Channel" (and not to the south of it). It says that the 1881 Treaty did not attribute them to either Party and that they must therefore be divided between the two countries. For the "external" part of the Channel, and out of the various possibilities that exist, the Court limits itself to considering that the Channel has two arms: the "Chilean" arm, up to Cape San Pío and even beyond, and the "Argentine" arm, through the Goree and Picton Passes (it has already been seen above, in point A, that the latter is a distortion of the Argentine argument). As a result, Picton, Nueva and Lennox Islands are also in the Channel. One might ask why, in this case, the Court did not distribute them in accordance with the principle of "appurtenance" (accession, contiguity or adjacency) that it applied to the other islands of the Channel.

The answer is that the Court does not accept the possibility of applying this regime to Picton, Lennox and Nueva Islands because it says *prima facie* all the territories in dispute must be considered to have been covered by an express clause of the 1881 Treaty since the only alternative would have been a total failure of the Treaty. This contradicts the approach taken to the problem of the islands in the Channel, which, as stated earlier, the Court asserts do not fall within any specific attribution (paras. 98 (*c*) and 106). As a result of this contradiction, the Court divides the Beagle Channel, as defined by the Court itself, into two sections subject to different legal regimes, without supplying any justification for this.

Other examples can be mentioned:

In paragraph 66 (3), on the subject of the interpretation of the 1881 Treaty, the Decision considers that the "speech" by Bernardo de Irigoyen in 1881 and the "speech" by Melquíades Valderrama, in so far as they relate to the islands in dispute, are diametrically opposed and must both be rejected as cancelling each other out. But, in paragraph 130, in dealing with the confirmation material subsequent to the Treaty, the Court rejects Bernardo de Irigoyen's speech as insufficient to prove Argentina's arguments while accepting Valderrama's speech as clear evidence for Chile's interpretation of the Treaty.

In paragraphs 14 and 24, the arbitral Decision includes the entire Tierra del Fuego archipelago among the areas in dispute before 1881 and covered by the Boundary Treaty. In paragraph 101, however, in order to avoid the problem of interpretation created by the islands to the west of

Tierra del Fuego, the Court decides to consider those islands as not being part of the boundary dispute prior to 1881 and therefore not covered by the Treaty.

D) *Flaws of interpretation*

Any judge to whom a dispute is submitted must interpret the legal norms applicable to the case. Interpretation of the law is a function regulated by the legal system. The interpreter has limits within which he can define the precise content of the legal norm he is interpreting. The law also tells him what methods to use for his interpretation. To this end, the Vienna Convention on the Law of Treaties has codified some customary norms on the subject and has even established a certain order of precedence among them.

Interpretation is thus a function determined and regulated by international law and not a task left simply to the discretion or whim of the judge. He is not allowed to overstep the established limits, for then he would not be interpreting the law but revising it. As stated by the International Court of Justice in a well-known passage of its advisory opinion on the interpretation of peace treaties (ICJ Reports, 1950), "the Court's function is to interpret treaties, not revise them".

The arbitral Decision is based mainly on the text of the 1881 Treaty. This being so, the Court should have been guided in its interpretation by, among other rules, those known as "appeal to context" and "useful effect". The Court ignores these rules, particularly the second one, with the result that the Treaty, instead of being "intepreted", is amended and adapted in a manner that contradicts its letter and spirit.

Thus, for instance, in deciding in paragraph 101 that the islands west of Tierra del Fuego were not considered part of the boundary dispute prior to 1881 and therefore were not covered by the Treaty, the Decision leaves a specific term of article III of that instrument without useful effect.

A good deal of article 1 of the Treaty is also left without useful effect, since it refers to areas that, according to the Decision, were not part of the boundary questions.

The Court also rejects, in paragraph 65, the Argentine contention that by the clause "and the other islands there may be on the Atlantic", article III of the Treaty attributed to Argentina, Picton, Nueva and Lennox Islands among others. Having set aside this interpretation, the Court, in violation of the rule of useful effect, does not explain which islands—if not Nueva, Picton and Lennox Islands—the Treaty attributed to Argentina by that clause.

Likewise, the words "up to Cape Horn" in article III of the Treaty lose all meaning and the clause attributing islands to Chile is interpreted as if the only condition for attribution is the fact that they are "to the south of Beagle Channel".

In interpreting article II of the Boundary Treaty, the Decision asserts that this clause attributed to Argentina the whole of Patagonia up to the Río Negro, a conclusion not borne out by the text of the Treaty, which refers to neither Patagonia nor the Río Negro. Furthermore, it leaves without useful effect or makes redundant a good deal of the sphere of appication of article I, which defines the boundary from north to south as far as the 52nd parallel of latitude.

Moreover, in interpreting the text of article III of the Treaty, the Court creates as an element of the delimitation the concept of the southern coast of Isla Grande, thus in effect revising the Treaty since that concept is found neither in the text of the Treaty, nor in the *travaux préparatoires*, and was not put forward by either Party.

E) *Geographical and historical errors*

In addition to the flaws already mentioned, the Decision contains erroneous assertions as to facts which affect its motivation, its operative part or both.

Some of these errors are geographical. For instance, in paragraphs 100 and 101, it is said the Stewart, O'Brien and Londonderry islands are south of the north-west arm of the Beagle Channel. Actually, these islands have no relationship to the Channel, they lie outside it and even to the north of its general direction. In paragraph 14, the Decision invents a "Cape Horn archipelago", extending to the south, south-west and west of the Isla Grande, as something distinct from the Tierra del Fuego archipelago.

It should also be mentioned that the maritime boundary-line traced by the Court of Arbitration on the chart attached to the Award is flawed by inaccuracies and technical errors that make it unreliable.

Other errors are historical. The Court of Arbitration makes some assertions in this area that correspond neither to reality nor to the evidence offered, and also do not seem to be the result of independent research by the Court itself. For example, it asserts that Chile, throughout the boundary dispute prior to 1881, always claimed sovereignty over the whole of Patagonia up to the Río Negro (para. 13); that the islands to the west of the Tierra del Fuego archipelago were not in dispute and were not covered by the Boundary Treaty (para. 101); that there are documents relating to the discovery and early exploration of the Beagle Channel that show the southern arm, defined by the Court itself as including Goree Pass between Lennox and Navarino Islands (paras. 87 and 4), to be the real eastern course of the Channel; and that, for the 1876-1881 negotiators, the Atlantic Ocean went only as far as Staten Island (para. 65 (*e*)).

This last position taken by the Court combines with its assertion as to the inapplicability of the Atlantic principle in the clause on attribution of islands "on the Atlantic" to Argentina, in article III of the Treaty (para. 66 (2) (*b*)). This assertion itself embodies a clear contradiction.

This limitation of the validity of the Atlantic principle also embodies a geographical error, since it ignores the opinion of the international scientific community (International Hydrographic Bureau, 1919) which defined Cape Horn as the point marking the boundary between the Atlantic and Pacific Oceans.

In setting aside the question of the division between the oceans in connection with the traditional boundary between the two countries (Cape Horn), the Award ignores the guiding principle that governed the jurisdictional division between Argentina and Chile even before their independence and that was later formalized in various instruments, in particular the 1881 Treaty, the 1893 Protocol and the 1902 Act clarifying the agreements on arbitration and arms limitation.

In the same order of ideas, in dealing with the Argentine argument upholding the Atlantic-Pacific principle, the Court commits another serious historical error when it analyses the scope of the 1893 Protocol (paras. 73-78). Argentina maintained that since the Protocol supplemented and clarified the 1881 Treaty, it was an authentic interpretation of the Treaty. Since the second sentence of article 2 of the Protocol says:

> ". . . it being understood that, by virtue of the provisions of the 1881 Treaty, the sovereignty of each State over its respective coastline is absolute, with the result that Chile cannot lay claim to any point towards the Atlantic and the Argentine Republic cannot lay claim to any point towards the Pacific",

the Atlantic-Pacific principle contained in the 1881 Treaty is thus confirmed and is, as such, applicable to the current dispute. Argentina also maintained that the Protocol introduced modifications to the Treaty as regards two specific sections of the border where demarcation difficulties had arisen up until that point, and that it did so in application of the general principle of respect for the absolute sovereignty of each State over its respective coastline. The Court, however, asserts that the scope of the Protocol lies outside the Treaty as such, in date as well as in substance. This is a basic error of law, for the 1893 Protocol was always considered by both Parties—without prejudice to their differences as to its scope—as a treaty specifically amending and interpreting the 1881 Treaty, as is clear from its text, its object and its purpose. The Court then immediately contradicts itself by acknowledging in subsequent paragraphs that the Protocol did indeed refer to the 1881 Treaty.

The Court commits other equally serious errors when it describes the Protocol as simply a demarcation instrument and asserts that it bore no relation to the Beagle Channel region or the islands in dispute and could not have done so because the 1881 Treaty did not provide for any demarcation of this region.

The Court is mistaken as to the nature of the Protocol, for the Protocol did not only lay down demarcation procedures, but also included important delimitation provisions which went so far as to alter the boundary set by the 1881 Treaty.

F) *Lack of balance in evaluating the arguments and evidence submitted by each Party*

The Award does not give equal treatment to the arguments and evidence submitted by the two Parties. It does not give objective consideration to all the important points of the controversy over the interpretation of the Treaty, which might have influenced the outcome. It ignores background material to the case which provides specific relevant insights into the situation under examination and overlooks, particularly as regards later conduct, the actual historical context of the dispute, basing itself on general guidelines or critera derived from a modern reconstruction of that conduct. The consequences of this lack of balance are particularly serious since the Court does not arrive at a clear-cut conclusion in favour of the Chilean interpretation, but simply prefers it over the Argentine interpretation, after weighing the cumulative weaknesses of each Party's position. The scale is thus tipped in favour of the Chilean interpretation, after ignoring or distorting the Argentine arguments, ignoring important evidence, committing errors of fact, etc.

The Court's attitude of systematic partiality towards Chile and against Argentina is evident throughout the Award, but is particularly noticeable in part II, chapters III, "The Boundary Treaty of 1881" and IV, "Corroborative or Confirmatory Incidents and Material", above all when it decides on what really constitutes the Beagle Channel, on the meaning of the concept of "Atlantic Ocean", or on the relative value of the written and oral statements of the negotiators of the 1881 Treaty.

This lack of balance is also evident when the Court fails to consider important Argentine arguments and ignores the evidence that corroborates them. This is particularly true on the issue of the attitude of the Parties with respect to cartography, the broad meaning of the concept "Tierra del Fuego" in the "Islands clause" of article III, and the official acknowledgement by both Parties of the existence of an unresolved demarcation issue in the region in dispute.

The foregoing list of flaws is in no way exhaustive. Even so, those mentioned here are sufficient to demonstrate the abuse of power, the flagrant errors and the violation of essential legal rules committed by the Court of Arbitration as regards both legal substance and procedures.

Therefore, and by virtue of the aforesaid, the Government of the Republic of Argentina declares that, given of the manifest nullity of the Decision of the Court of Arbitration and of the Award by Her Britannic Majesty which is its consequence, it does not consider itself bound to abide by it.

Buenos Aires, 25 January 1978

NOTE FROM THE MINISTER FOR FOREIGN AFFAIRS OF THE REPUBLIC OF CHILE TO THE AMBASSADOR OF ARGENTINA*

Santiago, 26 January 1978

Sir,

I have the honour of replying to the Note which the Minister for Foreign Affairs of the Argentine Republic delivered yesterday to the Ambassador of Chile in Buenos Aires concerning the arbitral Award by Her Britannic Majesty on the controversy in the Beagle Canal region.

The Notes states that your Government, after carefully studying the Award, "has decided to declare the Arbitrator's decision irrevocably insuperably null and void" and attaches, to this end, a lengthy document entitled "Declaration of Nullity". It adds that the Argentine Republic "will not recognize the validity of any title that the Republic of Chile may invoke, on the basis of the arbitral Award, in order to arrogate to itself sovereign rights over any territory or maritime area".

The aforesaid Note also states that, in order not to see "the quality" of the relations between the two Republics impaired "by an arbitral decision issued in violation of international law", the most suitable course for finding permanent and definitive solutions, and that most in keeping with our history, "is to negotiate bilaterally all the jurisdictional differences between the two countries, as the recent meeting of the Presidents of the two nations, held in the city of Mendoza, demonstrated".

My Government categorically rejects the strange "Declaration of Nullity" which the Note contains. This rejection is based on elementary norms of international law, as I indicate in the "Official Declaration" a copy of which accompanies this Note.**

Without prejudice to the foregoing, my Government will in due course issue the necessary reply to the factual and legal assertions contained in the "Declaration of Nullity".

Nevertheless, it is my duty to advise you that, contrary to the assertions in the aforementioned Note, my country's clear rights and indisputable sovereignty over the territories and maritime areas of the southern region are based on uncontestable titles emanating not only from binding treaties between the Republic of Chile and the Republic of Argentina but also from the arbitral Award which confirms and recognizes them fully.

Those rights and that sovereignty will continue to be exercised in conformity with such titles.

My Government acknowledges your Government's well-intentioned proposal to "negotiate bilaterally", but I must reiterate very

* Translated from Spanish into English by the Secretariat of the United Nations.
** Not reproduced here.

emphatically that such negotiations could never touch on—as they never touched on in the past—questions already resolved by Her Britannic Majesty's Award. You are well aware that the Government of Chile expressed its full acceptance of the Award of 2 May 1977 and has complied with it fully.

With regard to any delimitation of maritime areas beyond what has already been settled by the Arbitrator, Chile's firm, unchanging position does not alter my Government's willingness to arrive at a direct understanding in conformity with international law. In saying this, I wish to state for the record that if up to now it has not been possible to reach such an understanding, it is because your Government has persistently intimated that it would refuse to comply with the British Award—an attitude that culminated in the recent "Declaration of Nullity"—and because it has refused to recognize Chilean sovereignty over all the islands to the south of the Beagle Canal up to Cape Horn, in open violation of express provisions of the 1881 Boundary Treaty.

Lastly, notwithstanding its willingness to resolve, wherever possible through direct agreement, all issues relating to maritime boundaries, my Government reiterates that if this is not achieved at the initiative of the Presidents of the two Republics, the time will have come to proceed as ordered by the Treaty on the Judicial Settlement of Disputes signed in 1972, as I stated in the Note which I sent to the Foreign Minister of Argentina on 10 January of this year. Accordingly, my Government maintains and repeats the invitation, extended to your Government at that time, to establish, by mutual consent and in conformity with article IV of that Treaty, the points, questions or differences on which the International Court of Justice will have to rule.

I am confident that your Government will not reject this call to implement, by common accord, the judicial settlement procedure set forth in a Treaty that resulted from a well-intentioned Argentine proposal.

Allow me to take this opportunity to convey to you the renewed assurances of my highest and most distinguished consideration.

Patricio CARVAJAL PRADO
Vice-Admiral
Minister for Foreign Affairs of Chile

His Excellency Mr. Hugo Mario Miatello
Ambassador of the Argentine Republic
Santiago

III

ACT OF PUERTO MONTT ESTABLISHING A SYSTEM OF NEGOTIATION BETWEEN THE REPUBLIC OF ARGENTINA AND THE REPUBLIC OF CHILE, SIGNED AT PUERTO MONTT ON 20 FEBRUARY 1978

ACTE DE PUERTO MONTT CRÉANT UN MÉCANISME DE NÉGOCIATION ENTRE LA RÉPUBLIQUE ARGENTINE ET LA RÉPUBLIQUE DU CHILI, SIGNÉ À PUERTO MONTT LE 20 FÉVRIER 1978

ACT OF PUERTO MONTT, SIGNED AT PUERTO MONTT, CHILE, ON 20 FEBRUARY 1978

Act[1]

Their Excellencies the Presidents of Argentina, Lieutenant-General Jorge Rafael Videla, and of Chile, General Augusto Pinochet Ugarte, meeting at Puerto Montt on 20 February 1978 upon a joint initiative, in the spirit of harmony and friendship which prevailed at the meeting held at Mendoza, Argentine Republic, on 19 January 1978, having studied at these meetings the issues pertaining to the relations between the two countries, particularly those stemming from the current situation in the southern region, and motivated by the common purpose of strengthening the historical fraternal ties between their two peoples, place on record the following:

(A) The aforesaid meeting at Mendoza laid the bases for setting in motion negotiations through which direct understandings could be reached on the fundamental issues of bilateral relations between Argentina and Chile, in particular those matters which in the view of one or the other Government remain pending in the southern region.

(B) The above bases of understanding—ratified at the present meeting—in no way modify the positions taken by the Parties with respect to the Arbitral Award on the Beagle Channel, as laid down in the notes and statements issued by the respective Governments.

(C) The two Governments have issued instructions to their respective authorities in the southern zone referred to above, so as to avoid actions or attitudes inconsistent with the spirit of peaceful coexistence which must be maintained between both countries.

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[1] Came into force on 20 February 1978 by signature. Reproduced from United Nations, *Treaty Series*, vol. 1088, No. 16668.

(D) Their Excellencies the Presidents of Argentina and Chile, in their continuing endeavour to find ways of achieving direct understandings, and maintaining in their entirity and expressly reserving the respective positions and rights of their Governments, have agreed as follows:

1. A system of negotiations shall be established comprising three phases, to be conducted by Commissions made up of representatives of the two Governments.

2. In the first phase, without prejudice to the provisions of paragraph (C) and other arrangements which the Governments of Argentina and Chile may make with a view to strengthening coexistence, a Joint Commission shall propose to the Governments, within 45 days of the date of the present Act, measures conducive to creating the necessary conditions of harmony and equity until an integral and definitive solution is found to the questions set forth in paragraph 3.

The Governments of Argentina and Chile shall agree on appropriate measures.

Similarly, while negotiations are under way, the Parties shall not apply special rules for delimitation which one or the other of them may have laid down, nor shall they produce facts which may serve as a basis for or support any future delimitation in the southern zone, where such rules or facts may give rise to friction or difficulties with the other Party.

3. In the second phase, another Commission, likewise made up of Argentine and Chilean representatives, shall examine the following points:

3.1. Definitive delimitation of the respective jurisdictions of Argentina and Chile in the southern zone;

3.2. Measures to promote policies for the physical integration, development of economic complementary, and exploitation of natural resources by each State or jointly, including environmental protection;

3.3. Consideration of common interests in Antarctica, co-ordination of policies in respect of that continent, legal protection of the rights of both countries and study of progress in bilateral agreements on neighbourly relations with each other in Antarctica;

3.4. Questions related to the Strait of Magellan raised by the Parties, bearing in mind the relevant treaties and rules of international law;

3.5. Questions related to straight base lines.

This Commission shall begin its assignment from the date on which both Governments reach agreement on the proposals of the

First Commission, and shall complete its work within six months at most.

4. In the third phase, once the first two are completed, the proposals of the Commission shall be submitted to the Governments of Argentina and Chile in order that they may agree on the relevant international instruments.

It is understood that those instruments shall be inspired by the spirit of the treaties which bind the Parties to each other, so as to be compatible with them without affecting or modifying them.

Similarly, what is agreed on shall have no effect with respect to Antarctica, nor may it be interpreted as prejudging the sovereignty of one or the other Party in the Antarctic territories.

(E) Desirous of finding an early solution to the questions still pending, Their Excellencies the Presidents of Argentina and Chile exchanged opinions on possible lines of delimitation of the jurisdiction of the respective countries.

(F) In proceeding thus, both Presidents feel certain that they are interpreting the deep-seated aspirations for peace, friendship and progress of the peoples of Argentina and Chile, and that they have been faithful to the legacy handed down from the Founding Fathers San Martín and O'Higgins.

The present Act is done in two copies, both equally authentic.

[Jorge Rafael VIDELA] [Augusto PINOCHET UGARTE]

IV

ACT OF MONTEVIDEO BY WHICH CHILE AND ARGENTINA REQUEST THE HOLY SEE TO ACT AS A MEDIATOR WITH REGARD TO THEIR DISPUTE OVER THE SOUTHERN REGION AND UNDERTAKE NOT TO RESORT TO FORCE IN THEIR MUTUAL RELATIONS (WITH SUPPLEMENTARY DECLARATION), SIGNED AT MONTEVIDEO ON 8 JANUARY 1979

ACTE DE MONTEVIDEO, PAR LEQUEL LE CHILI ET L'ARGENTINE SONT CONVENUS D'INVITER LE SAINT-SIÈGE À AGIR COMME MÉDIATEUR DANS LE CADRE DE LEUR DIFFÉREND RELATIF À LA RÉGION AUSTRALE ET DE NE PAS RECOURIR À LA FORCE DANS LEURS RELATIONS MUTUELLES (ACCOMPAGNÉ D'UNE DÉCLARATION SUPPLÉMENTAIRE), SIGNÉ À MONTEVIDEO LE 8 JANVIER 1979

ACT OF MONTEVIDEO[1] BY WHICH CHILE AND ARGENTINA REQUEST THE HOLY SEE TO ACT AS A MEDIATOR WITH REGARD TO THEIR DISPUTE OVER THE SOUTHERN REGION AND UNDERTAKE NOT TO RESORT TO FORCE IN THEIR MUTUAL RELATIONS

1. At the invitation of His Eminence Antonio Cardinal Samoré, Special Representative of His Holiness Pope John Paul II for a peace mission agreed to by the Governments of the Republic of Chile and of the Argentine Republic, a meeting was held at Montevideo between the Ministers for External Relations of the two Republics, His Excellency Mr. Hernán Cubillos Sallato and His Excellency Mr. Carlos W. Pastor, who, having analyzed the dispute and taking into account;

2. That His Holiness Pope John Paul II, in his message to the Presidents of the two countries on 11 December 1978, expressed his conviction that a calm and responsible examination of the problem will make it possible to fulfil "the requirements of justice, equity and prudence as a sure and stable basis for the fraternal coexistence" of the two peoples;

3. That in his address to the College of Cardinals on 22 December 1978, the Holy Father recalled the concerns and the hopes he had al-

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[1] Came into force on 8 January 1979 by signature. Reproduced from United Nations, *Treaty Series*, vol. 1137, No. 17838.

ready expressed with regard to the search for a means of safeguarding peace, which is keenly desired by the peoples of both countries;

4. That His Holiness Pope John Paul II expressed the desire to send to the capitals of the two States a special representative to obtain more direct and concrete information on the positions of the two sides and to contribute to the achievement of a peaceful settlement of the dispute;

5. That that noble initiative was accepted by both Governments;

6. That since 26 December 1978, His Eminence Antonio Cardinal Samoré, who was appointed to carry out this peace mission, has been holding talks with the highest authorities of the two countries and with their closest associates;

7. That on 1 January, which by pontifical order was celebrated as "World Peace Day", His Holiness Pope John Paul II referred to this delicate situation and expressed the hope that the authorities of the two countries, adopting a forward-looking, balanced and courageous approach, would take the path of peace and would be able to achieve, as soon as possible, the goal of a just and honourable settlement;

8. Declare that the two Governments, through this Agreement, reiterate their appreciation to the Supreme Pontiff, John Paul II, for his dispatch of a special representative. They decide to avail themselves of the Holy See's offer to intervene and, with a view to deriving the greatest benefit from this gesture by the Holy See in making itself available, agree to request it to act as mediator for the purpose of guiding them in the negotiations and assisting them in the search for a settlement of the dispute, to which end the two Governments agreed to seek such method of peaceful settlement as they considered most appropriate. For that purpose, they will carefully take into account the positions maintained and expressed by the Parties in the negotiations already held in connection with the Puerto Montt Act[2] and the proceedings in pursuance of that Act;

9. The two Governments will inform the Holy See both of the terms of the dispute and of such background information and opinions as they deem relevant, especially those which were considered in the course of the various negotiations, the records, instruments and proposals of which will be placed at its disposal;

10. The two Governments declare that they will raise no objection to the expression by the Holy See, during these proceedings, of such ideas as its thorough studies on all disputed aspects of the problem of the southern zone may suggest to it, with a view to contributing to a peaceful settlement acceptable to both Parties. They declare their readiness to consider such ideas as the Holy See may express.

11. Accordingly, by this Agreement, which is concluded in the spirit of the norms laid down in international instruments for the preser-

[2] United Nations, *Treaty Series*, vol. 1088, p. 135.

vation of peace, the two Governments associate themselves with the concern of His Holiness Pope John Paul II and consequently reaffirm their will to settle the outstanding issue through mediation.

DONE at Montevideo, on 8 January 1979, and signed in six identical copies.

[Carlos W. PASTOR] [Hernán CUBILLOS SALLATO]

[Antonio CARDINAL SAMORÉ]

Antonio Cardinal Samoré, Special Envoy of His Holiness Pope John Paul II, in accepting the request for mediation from the Governments of the Republic of Chile and of the Argentine Republic, asks that that request should be accompanied by an undertaking that the two States will not resort to the use of force in their mutual relations, will bring about a gradual return to the military situation existing at the beginning of 1977 and will refrain from adopting measures that might impair harmony in any sector.

The Ministers for External Relations of the two Republics, His Excellency Mr. Hernán Cubillos Sallato and His Excellency Mr. Carlos Washington Pastor, signify their agreement on behalf of their respective Governments and join the Cardinal in signing six identical copies.

DONE at Montevideo, on 8 January 1979.

For the Government of the Argentine Republic:	For the Government of the Republic of Chile:
[Carlos W. PASTOR]	[Hernán CUBILLOS SALLATO]
Minister for External Relations and Worship	*Minister for External Relations*

[Antonio CARDINAL SAMORÉ]

V

THE PROPOSAL OF THE MEDIATOR, SUGGESTIONS AND ADVICE (PAPAL PROPOSAL IN THE BEAGLE CHANNEL DISPUTE)

PROPOSITION DU MÉDIATEUR, SUGGESTIONS ET AVIS (PROPOSITION DU SAINT-SIÈGE RELATIVE AU DIFFÉREND RELATIF AU CANAL DE BEAGLE)

THE PROPOSAL OF THE MEDIATOR, SUGGESTIONS AND ADVICE* (PAPAL PROPOSAL IN THE BEAGLE CHANNEL DISPUTE)

To their Excellencies, the Ministers of Foreign Affairs of Argentina and Chile received in the Vatican**

Your Excellencies, Ladies and Gentlemen:

1. I am deeply moved on this occasion when, following your gracious reply to my invitation, I have the opportunity to receive you, the Ministers of Foreign Affairs of the Republic of Argentina and of the Republic of Chile, together with the delegations which your two Governments have assigned to my work of mediation in the dispute over the southern zone.

I am sure I am not mistaken in thinking that your two peoples and your highest authorities, as also yourselves, are experiencing similar feelings in knowing that today may well be, in accordance with the will of God, the Merciful, the beginning of the final stage of an arduous and difficult labour designed to establish a firm and lasting peace between your two countries, both Catholic and both beloved of the Pope.

2. It is true that since your peoples achieved independence in the concert of nations, there have been disputes between you. It is true that in your mutual relations there has not always been a complete and luminous *tranquillitas ordinis*, the concise expression used by St. Augustine as the supreme definition of peace.

But it is also true—and I emphasized this in September last year before the members of your Governments—that it is gratifying and consoling to observe that there has never been a war between your two countries. This is a singular fact perhaps unique in the history of relations between neighbouring countries. I would almost be bold enough to

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* Translated from Spanish into English by the Secretariat of the United Nations.
** On 12 December 1980.

say that I see in this a special assistance from the providence of God the Merciful.

In view of these facts, I believe that no one can deny or challenge this assumption: if God during this period has presided with such love over the development of relations between your two countries, how can we fail to do everything in our power not to lose this inestimable gift of peace, a privilege of your common history?

On more than one occasion—and specifically in my message for the Day of Peace in 1979—I stressed the need for peace education. I pointed out that this objective will also be achieved, in my view, through the implementation of peace gestures, since the practice of peace brings peace with it. In those closing days of 1978 and the beginning of 1979—so full of tensions for your countries and for all your citizens and also so full of concerns after my recent election as Pope—God, the Father of us all, encouraged me to carry out a peace gesture that was not easy but was audacious, perilous, involved and also full of hope.

I now venture to request a similar gesture from your two nations, which were never at war, in the face of a world which unfortunately has never known peace and is full of fear of further violence. This is a gesture which I request from your peoples and above all from the highest authorities of both your countries: I want these authorities, the defenders of the legitimate interests of your nations, to receive the supreme reward that history will grant them both for their valour in choosing peace at a difficult moment and for having given in this way to the world—in particular to those who govern the destinies of nations—an example of cordiality and sensitiveness as a criterion of government. This criterion does not exclude the adoption of less agreeable decisions in favour of a true and complete peace, open to progress and to the full realization of a coexistence that fulfils their requirements of human brotherhood.

I am convinced that this audacious gesture in choosing peace, although it may involve difficult decisions, not only will avoid further problems but will also show the path to be followed when other tensions arise in international relations and will bring highly positive fruits to your two countries. "And we know that all things work together for good to them that love God" affirms St. Paul;[1] for those that love God "everything" works for the good; and to choose peace is a way of loving God.

I have no hesitation in asserting that, with the aid of the Almighty, we can work for such a good, taking advantage of this dispute which has caused so much sorrow during recent years. If we fulfil these peace gestures we shall be able to establish and consolidate a more durable and more complete peace than that enjoyed in previous years; a peace which represents a true *tranquillitas ordinis* in the most varied and broadest sectors of the life of your countries; a peace which will

[1] Romans 8, 28.

strengthen and fortify the numerous ties which bind you, for your own advantage; even more, a peace which may have beneficial repercussions outside your national confines and even outside your own continent.

3. After having sought enlightenment from the Lord, I accepted the request for mediation. I also considered that the solution of your dispute could and should facilitate an ordered progress of its own and the intensification and development of cooperation and integration between two sister nations in all possible fields of activity, provided that you do not lose an appropriate vision of the future.

Since your two nations are clearly linked by language, faith and religious feelings, the Mediator considers that it may be possible to envisage the extension of these ancient ties to other fields (economic, industrial, commercial, tourist and cultural): the circumstances which make this desirable and advisable are numerous.

4. Moreover, this prospect, which may seem ambitious, is nevertheless reasonable and viable. It suffices to take into account that the peoples of Argentina and Chile respect and love each other spontaneously, profoundly and sincerely; we also have clear evidence of their desire to live together in a calm environment of secure and fruitful peace. In the face of these facts, which no impartial observer may deny, we hope that both Chileans and Argentinians will achieve the fulfilment of such a human desire: a complete and final solution of the dispute over the southern zone, sealed with a solemn agreement of perpetual friendship proclaimed before the international community. Such a treaty would logically involve the undertaking to solve any possible future dispute by peaceful means, excluding—in the life of both nations—recourse to force or the threat of the use of force; a recourse which is to be avoided because it substantially vitiates any solution that is obtained by it.

5. If in this manner the dispute over the southern zone were to allow the profound desires of the two peoples to be reflected in such undertakings, the Mediator considers that our best hope would be to convert this zone into an irrefutable symbol of the new reality. In my opinion this can be achieved by declaring it a zone of peace, a zone in which Argentina and Chile will seek to consolidate their decision in favour of fraternal coexistence, setting aside any other kind of measures or attitudes that may appear less suitable for the development of their friendly relations.

6. Having placed the dispute in this broader and more attractive framework, I believe that the difficulties which undoubtedly exist for its solution will become less important as they become illuminated by the benefits which are bound to ensue. At the same time, for this reason, it becomes urgent to achieve a final solution as soon as possible.

In the final analysis, I feel that we must consider this dispute in the light of all the possibilities for cooperation that I have referred to and other possibilities that you may yourselves discover. It will thus become a subject of lesser importance by becoming part of a comprehensive and

ambitious project which looks towards the future. It would therefore be unreasonable to over-emphasize any obstacle to this broader project.

In the context, I feel that it would be difficult for any limitations placed on the natural, comprehensible and respectable aspirations regarding this geographical zone to attain such importance as to justify the non-acceptance of the suggestions and advice put forward for the solution of the dispute and consequent breakdown of these negotiations which have gone on for some time and represent very logical desires.

In other words, if the settlement of this dispute is to pave the way for a marked improvement in the relations between the two countries, it would be worth our while to bring all of our good will to such a settlement since its advantages would make us forget all the rest.

7. I have said more than once—recalling the words of the first Montevideo Agreement—that the solution must be just, equitable and honourable. Indeed, these must be the characteristics of any agreement which is to be real and lasting. We must seek a solution which is on a higher level and we must try to discover the divine purposes which today govern the general relations between your countries.

In our efforts to obtain this result, I believe that we must imbue our material law with a spirit of fairness derived from what is naturally just for the present moment; such natural justice is not often reflected exactly in the specific provisions of the law.

I can assure you that, in drawing up this proposal which now, in my capacity as Mediator I am to hand over to you, I have sought inspiration—I could do no less—in criteria of justice which must remain beyond reproach if we are to avoid grounds for further disputes. I have tried, at the same time, to add to these criteria considerations of fairness the elaboration of which, it is true, is less easy but which also may be forgotten in our efforts to reach an honourable settlement. I have also, finally, suggested for the settlement of this dispute, what the old Roman jurists and also their canonical successors meant by the expression *ex bono et aequo*; this means that the human intelligence and judgement, in assessing a series of circumstances of various kinds, does not leave aside or disregard the support and the enlightenment of divine wisdom.

I can also affirm that the body of proposals that I have put forward follows a logical order and also avoids expressions that might appear less agreeable to one or the other party. I have also taken into account the understandings reached or envisaged during the bilateral negotiations held in 1978.

If the solution which I propose to you is, as it seems to me, just and fair, it would be difficult not to find it honourable for both parties, a quality which all your compatriots and all of us here desire.

8. Indeed, it is clear that both your peoples desire peace. They have repeatedly expressed this desire on the occasion of the recent National Congresses, both Eucharistic and Marian, held in Chile and

Argentina and attended by large crowds. In their statements, the Catholic leaders, on behalf of their respective eccleasiastical groups, expressed very special hopes for the success of this mediation. I am sure that they will continue their prayers, especially now that we are entering upon—at least this is my hope—on the concluding phase of our work.

I am convinced that the united public opinion of your countries—so interested in this problem—will support and sustain those who, because of their lofty responsibilities, must take the appropriate decisions in the coming weeks.

For my part, I feel that I must bear witness to the diligence and firmness with which the authorities of both nations, and all those representing them here, have put forward and defended what they consider to be the patrimony of their respective countries, with abundant documentation and varied arguments, illustrated by lengthy talks. I believe that nobody—either now or in the future—can feel justified in reproaching them with neglect or ineptitude in the defence of their legitimate national interests, although in acceding to my suggestions and advice they may have to modify the positions they have maintained. May their consciences remain always clear after having conscientiously fulfilled their duty.

9. At the beginning of my statement I said I was deeply moved at this meeting. I cannot conclude my remarks without telling you that my initial feelings have taken shape in the solid hope that, with the help of Providence, our meeting of today and its discussions are taking place under the watchful and loving eyes of the Holy Virgin, Our Lady of Guadalupe. Today is her feast day and this begins the jubilee year recalling the famous appearances of December 1531. How can she fail to give us her support and all her protection, she to whom your peoples have given the title of Empress of the Americas? How can Holy Mary fail to listen to the prayers of her Argentine and Chilean children who with such love and faith in her are assembling in Luján and in Maipú?

As her children and with our hearts full of hope, we pray that she will bring us peace. Let us pray that She, who in Bethlehem heard the song of peace of the angels, will grant that from now on—and not only during the coming Christmas festival—this marvellous hymn will continue to be heard—a desire, a watchword, a promise, a firm proposal and a testimony of a new reality in your countries, which both enjoy the title of the land of Mary. And may the song be transformed into this prayer: "Mary, our Mother, Queen of Peace, fill our hearts with desires for peace and may these desires be translated into works of peace, so that we all achieve the well-being promised by your Son, the Prince of Peace.

10. With these feelings and these hopes and—why not confess it?—with a certain trepidation, which you probably share, I hand over to you, Ministers, with some reserve, the text of my proposal, my suggestions and my advice. I am sure that your Governments will examine it carefully.

I would like to think that during these feasts of Christmas, New Year and the Epiphany, in which we Christians enjoy the liturgical celebration of the mystery of "God with us", you will be able to give mature thought to your reply. No one will be surprised at my hope that this reply will be such that it will open up a path towards the happy conclusion of this dispute, which has already gone on for some time and has already caused enough sorrow.

For my part, I am ready to continue my activities as Mediator until the achievement of a final agreement. May the Lord give me power to carry out this task faithfully.

To you, to your nations and to all your citizens and governing bodies I express my fervent desires for peace; for a true, complete and definitive peace; for a peace which brings joy to all the dear children of your countries and which is also accompanied by the benefits of mutual respect, fraternal coexistence and Christian well-being in the daily life of your nations. With my cordial apostolic blessing!

VI

JOINT DECLARATION OF PEACE AND FRIENDSHIP BETWEEN ARGENTINA AND CHILE OF 23 JANUARY 1984

DÉCLARATION CONJOINTE DE PAIX ET D'AMITIÉ ENTRE L'ARGENTINE ET LE CHILI, DU 23 JANVIER 1984

JOINT DECLARATION OF PEACE AND FRIENDSHIP*

The Ministers for Foreign Affairs of the Republic of Chile and the Argentine Republic, meeting in Vatican City on 23 January 1984 on the initiative and at the invitation of His Holiness Pope John Paul II to reaffirm through their presence the significance of the launching of the final phase of the mediation exercise and the preparation of the final treaty, acceptable to both Parties and constituting the fitting outcome and development of the text of his Proposal, and representing their respective Governments, issue the following joint declaration:

Convinced that the launching of the present stage is an appropriate time for both Parties to call to mind the appeals of His Holiness Pope John Paul II and to express renewed appreciation of his patient and invaluable work to conduct the mediation exercise to a successful conclusion,

Recalling that the Papal Proposal of 12 December 1980 is founded on the desire to foster optimum relations between the two States, thus promoting peace and singling out Chile and Argentina as examples to be followed by the entire world,

The two Ministers, on behalf of their Governments, solemnly proclaim their decision to maintain and develop the bonds of lasting peace and eternal friendship between them and hence to settle disputes of any nature between their respective countries always and exclusively by peaceful means;

Motivated by these aims, the two Governments reiterate their firm determination to achieve a settlement as soon as possible of the dispute submitted to His Holiness Pope John Paul II for mediation.

DONE at Vatican City on this day, 23 January 1984.

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* Translated from Spanish into English by the Secretariat of the United Nations.

VII

TREATY OF PEACE AND FRIENDSHIP SIGNED BETWEEN THE REPUBLIC OF CHILE AND THE REPUBLIC OF ARGENTINA, SIGNED AT VATICAN ON 29 NOVEMBER 1984

TRAITÉ DE PAIX ET D'AMITIÉ ENTRE LA RÉPUBLIQUE DU CHILI ET LA RÉPUBLIQUE ARGENTINE, SIGNÉ AU VATICAN LE 29 NOVEMBRE 1984

TREATY OF PEACE AND FRIENDSHIP[1]

In the name of God the All-Powerful, the Government of the Republic of Chile and the Government of the Argentine Republic,

Recalling that on 8 January 1979 they requested the Holy See to act as Mediator in the dispute which has arisen in the southern zone, with the aim of guiding them in the negotiations and assisting them in the search for a solution; and that they sought his valuable aid in fixing a boundary line, which would determine the respective areas of jurisdiction to the east and to the west of this line, from the end of the existing boundary;

Convinced that it is the inescapable duty of both Governments to give expression to the aspirations of peace of their peoples;

Bearing in mind the Boundary Treaty of 1881, the unshakeable foundation of relations between the Argentine Republic and the Republic of Chile, and its supplementary and declaratory instruments;

Reiterating the obligation always to solve all its disputes by peaceful means and never to resort to the threat or use of force in their mutual relations;

Desiring to intensify the economic co-operation and physical integration of their respective countries;

Taking especially into account "The Proposal of the Mediator, suggestions and advice", of 12 December 1980;

Conveying, on behalf of their peoples, their thanks to His Holiness Pope John Paul II for his enlightened efforts to reach a solution of the dispute and to strengthen friendship and understanding between both nations;

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[1] Came into force on 2 May 1985. Reproduced from United Nations, *Treaty Series*, vol. 1399, No. 23392.

Have resolved to conclude the following Treaty, which constitutes a compromise, for which purpose they have designated as their representatives:

HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF CHILE: Mr. Jaime del Valle Alliende, Minister for Foreign Affairs;

HIS EXCELLENCY THE PRESIDENT OF THE ARGENTINE REPUBLIC: Mr. Dante Mario Caputo, Minister for Foreign Affairs and Worship.

Who have agreed as follows:

Peace and friendship

Article 1

The High Contracting Parties, responding to the fundamental interests of their peoples, reiterate solemnly their commitment to preserve, strengthen and develop their unchanging ties of perpetual friendship.

The Parties shall hold periodic meetings of consultation in which they shall consider especially any occurrence or situation which is likely to alter the harmony between them; they shall try to ensure that any difference in their viewpoints does not cause controversy and they shall suggest or adopt specific measures to maintain and strengthen good relations between both countries.

Article 2

The Parties confirm their obligation to refrain from resorting directly or indirectly to any form of threat or use of force and from adopting any other measures which may disturb the peace in any sector of their mutual relations.

They also confirm their obligation to solve, always and exclusively by peaceful means, all controversies, of whatever nature, which for any cause have arisen or may arise between them, in conformity with the following provisions.

Article 3

If a dispute arises, the Parties shall adopt appropriate measures to maintain the best general conditions of co-existence in all aspects of their relations and to prevent the dispute from becoming worse or prolonged.

Article 4

The Parties shall strive to reach a solution of any dispute between them through direct negotiations, carried out in good faith and in a spirit of co-operation.

If, in the judgement of both Parties or one of them, direct negotiations do not achieve a satisfactory result, either of the Parties may invite

the other to seek a solution of the dispute by means of peaceful settlement chosen by mutual agreement.

Article 5

In the event that the Parties, within a period of four months from the invitation referred to in the preceding article, do not reach agreement on another means of settlement and on the time-limit and other procedures for its application, or in the event that, such agreement having been obtained, a solution is not reached for any reason, the conciliation procedure stipulated in annex 1, chapter I, shall be applied.

Article 6

If both Parties or any one of them has not accepted the settlement terms proposed by the Conciliation Commission within the time-limit fixed by its Chairman, or if the conciliation procedure should break down for any reason, both Parties or any one of them may submit the dispute to the arbitral procedure established in annex 1, chapter II.

The same procedure shall apply when the Parties, in conformity with article 4, choose arbitration as a means of settlement of the dispute, unless they agree on other rules.

Questions which have been finally settled may not be brought up again under this article. In such cases, arbitration shall be limited exclusively to questions raised about the validity, interpretation and implementation of such agreements.

Maritime Boundary

Article 7

The boundary between the respective sovereignties over the sea, seabed and subsoil of the Argentine Republic and the Republic of Chile in the sea of the southern zone from the end of the existing boundary in the Beagle Channel, *i.e.* the point fixed by the co-ordinates 55°07.3′ South latitude and 66°25.0′ West longitude shall be the line joining the following points:

From the point fixed by the co-ordinates 55°07.3′ South latitude and 66°25.0′ West longitude (point A), the boundary shall follow a course towards the south-east along a loxodromic line until a point situated between the coasts of the Isla Nueva and the Isla Grande de Tierra del Fuego whose co-ordinates are South latitude 55°11.0′ and West longitude 66°04.7′ (point B); from there it shall continue in a south-easterly direction at an angle of 45° measured at point B and shall extend to the point whose co-ordinates are 55°22.9′ South latitude and 65°43.6′ West longitude (point C); it shall continue directly south along that meridian until the parallel 56°22.8′ of South latitude (point D); from there it shall continue west along that parallel, 24 miles to the south of the most southerly point of Isla Hornos, until it intersects the meridian running south from the most southerly point of Isla Hornos at co-

ordinates 56°22.8′ South latitude and 67°16.0′ West longitude (point E); from there the boundary shall continue South to a point whose co-ordinates are 58°21.1′ South latitude and 67°16.0′ West longitude (point F).

The maritime boundary described above is shown on annexed map No. I.*

The exclusive economic zones of the Argentine Republic and the Republic of Chile shall extend respectively to the east and west of the boundary thus described.

To the south of the end of the boundary (point F), the exclusive economic zone of the Republic of Chile shall extend, up to the distance permitted by international law, to the west of the meridian 67°16.0′ West longitude, ending on the east at the high sea.

Article 8

The Parties agree that in the area included between Cape Horn and the easternmost point of Isla de los Estados, the legal effects of the territorial sea shall be limited, in their mutual relations, to a strip of three marine miles measured from their respective base lines.

In the area indicated in the preceding paragraph, each Party may invoke with regard to third States the maximum width of the territorial sea permitted by international law.

Article 9

The Parties agree to call the maritime area delimited in the two preceding articles "Mar de la Zona Austral" (Sea of the Southern Zone).

Article 10

The Argentine Republic and the Republic of Chile agree that at the eastern end of the Strait of Magellan (Estrecho de Magallanes) defined by Punta Dungeness in the north and Cabo del Espíritu Santo in the south, the boundary between their respective sovereignties shall be the straight line joining the "Dungeness marker (former beacon)" and "marker I" on Cabo del Espíritu Santo in Tierra del Fuego.

The boundary described above is shown in annexed map No. II.*

The sovereignty of the Argentine Republic and the sovereignty of the Republic of Chile over the sea, seabed and sub-soil shall extend, respectively, to the east and west of this boundary.

The boundary agreed on here in no way alters the provisions of the 1881 Boundary Treaty, whereby the Strait of Magellan is neutralized for ever with free navigation assured for the flags of all nations under the terms laid down in article V.

* Maps are not reproduced.

The Argentine Republic undertakes to maintain, at any time and in whatever circumstances, the right of ships of all flags to navigate expeditiously and without obstacles through its jurisdictional waters to and from the Strait of Magellan.

Article 11

The Parties give mutual recognition to the base lines which they have traced in their respective territories.

Economic co-operation and physical integration

Article 12

The Parties agree to establish a permanent Binational Commission with the aim of strengthening economic co-operation and physical integration. The Binational Commission shall be responsible for promoting and developing initiatives, *inter alia*, on the following subjects: global system of terrestrial links, mutual development of free ports and zones, land transport, air navigation, electrical interconnections and telecommunications, exploitation of natural resources, protection of the environment and tourist complementarity.

Within six months following the entry into force of this Treaty, the Parties shall establish the Binational Commission and shall draw up its rules of procedure.

Article 13

The Republic of Chile, in exercise of its sovereign rights, shall grant to the Argentine Republic the navigation facilities specified in articles 1-9 of annex 2.

The Republic of Chile declares that ships flying the flag of third countries may navigate without obstacles over the routes indicated in articles 1-8 of annex 2, subject to the pertinent Chilean regulations.

Both parties shall allow in the Beagle Channel the Navigation and Pilotage System specified in annex 2, articles 11-16.

The stipulations in this Treaty regarding navigation in the southern zone shall replace those in any previous agreement on the subject between the Parties.

Final clauses

Article 14

The Parties solemnly declare that this Treaty constitutes the complete and final settlement of the questions with which it deals.

The boundaries indicated in this Treaty shall constitute a final and irrevocable confine between the sovereignties of the Argentine Republic and the Republic of Chile.

The Parties undertake not to present claims or interpretations which are incompatible with the provisions of this Treaty.

Article 15

Articles 1-6 of this Treaty shall be applicable in the territory of Antarctica. The other provisions shall not affect in any way, nor may they be intepreted in any way that they can affect, directly or indirectly, the sovereignty, rights, juridical positions of the Parties, or the boundaries in Antarctica or in its adjacent maritime areas, including the seabed and subsoil.

Article 16

Welcoming the generous offer of the Holy Father, the High Contracting Parties place this Treaty under the moral protection of the Holy See.

Article 17

The following form an integral part of this Treaty:

(*a*) Annex 1 on conciliation and arbitration procedure, consisting of 41 articles;

(*b*) Annex 2 on navigation, consisting of 16 articles;

(*c*) The maps* referred to in articles 7 and 10 of the Treaty and articles 1, 8 and 11 of annex 2.

References to this Treaty shall be understood as references also to its respective annexes and maps.

Article 18

This Treaty is subject to ratification and shall enter into force on the date of the exchange of instruments of ratification.

Article 19

This Treaty shall be registered in conformity with Article 102 of the Charter of the United Nations.

In faith whereof, they sign and affix their seals to this Treaty in six identical copies of which two shall remain in the possession of the Holy See and the others in the possession of each of the Parties.

DONE in Vatican City on 29 November 1984.

[Dante Mario CAPUTO] [Jaime DEL VALLE ALLIENDE]

* Maps are not reproduced.

ANNEX 1

CHAPTER I. CONCILIATION PROCEDURE PROVIDED FOR IN ARTICLE 5 OF THE TREATY OF PEACE AND FRIENDSHIP

Article 1

Within six months following the entry into force of this Treaty, the Parties shall establish an Argentino-Chilean Permanent Conciliation Commission, hereinafter called "the Commission".

The Commission shall be composed of three members. Each one of the Parties shall appoint a member, who may be chosen from among its nationals. The third member, who shall act as Chairman of the Commission, shall be chosen by both Parties from among the nationals of third States who do not have their habitual residence in the territory of the Parties and are not employed in their service.

Members shall be appointed for a period of three years and may be reappointed. Each of the Parties may proceed at any time with the replacement of the member appointed by it. The third member may be replaced during his term of office by agreement between the Parties.

Vacancies caused by death or any other reason shall be filled in the same manner as initial appointments, within a period not longer than three months.

If the appointment of the third member of the Commission cannot be made within a period of six months from the entry into force of this Treaty or within a period of three months from the beginning of the vacancy, as the case may be, any one of the Parties may request the Holy See to make the appointment.

Article 2

In the situation provided for in article 5 of the Treaty of Peace and Friendship, the dispute shall be brought before the Commission in the form of a written request, either jointly by the two Parties or separately, addressed to the Chairman of the Commission. The subject of the dispute shall be briefly indicated in the request.

If the request is not submitted jointly, the Party making it shall immediately notify the other Party.

Article 3

The written request or requests whereby the dispute is brought before the Commission shall contain, as far as possible, the designation of the delegate or delegates by whom the Party or Parties originating the request will be represented on the Commission.

It shall be the responsibility of the Chairman of the Commission to invite the Party or Parties who have not appointed a delegate to proceed promptly with such an appointment.

Article 4

Once a dispute has been brought before the Commission, and solely for this purpose, the Parties may designate, by common agreement, two more members to form part of it. The third member already appointed shall continue to serve as the Chairman of the Commission.

Article 5

If, when a dispute is brought before the Commission, any of the members appointed by a Party is unable to participate fully in the conciliation procedure, that Party must replace him as soon as possible for the sole purpose of the conciliation.

At the request of any one of the Parties, or on his own initiative, the Chairman may require the other Party to proceed with such a replacement.

If the Chairman of the Commission is unable to participate fully in the conciliation procedure, the Parties must replace him by common agreement as soon as possible for the sole purpose of the conciliation. If there is no such agreement, any of the Parties may request the Holy See to make the appointment.

Article 6

Having received a request, the Chairman shall fix the place and the date of the first meeting and shall invite to it the members of the Commission and the delegates of the Parties.

At the first meeting the Commission shall appoint its Secretary, who shall not be a national of any of the Parties, shall not have a permanent residence in their territory and shall not be employed in their service. The Secretary shall remain in office as long as the conciliation lasts.

At the same meeting, the Commission shall determine the procedure which is to govern the conciliation. Except if the Parties agree otherwise, the procedure shall be adversarial.

Article 7

The Parties shall be represented in the Commission by their delegates; they may, also, be accompanied by advisers and experts appointed by them for these purposes and they may request any testimony they consider appropriate.

The Commission shall have the power to request explanations from the delegates, advisers and experts of the Parties and from other persons they consider useful.

Article 8

The Commission shall meet in a place the Parties agree on, and, failing such an agreement, in the place designated by its Chairman.

Article 9

The Commission may recommend that the Parties adopt measures to prevent the dispute from becoming worse or the conciliation from becoming more difficult.

Article 10

The Commission may not meet without the presence of all its members.

Unless the Parties agree otherwise, all the Commission's decisions shall be taken by a majority vote of its members. In the Commission's records no mention shall be made of whether decisions were made unanimously or by a majority.

Article 11

The Parties shall facilitate the work of the Commission and shall, as far as possible, provide it with all useful documents and information. Similarly, they shall allow it to proceed in their respective territories with the summoning and hearing of witnesses and experts and with the carrying out of on-the-spot inspections.

Article 12

In finalizing its consideration of the dispute, the Commission shall strive to define the terms of a settlement likely to be accepted by both Parties. The Commission may, for this purpose, proceed to exchange views with the delegates of the Parties, whom they may hear jointly or separately.

The terms proposed by the Commission shall be only in the nature of recommendations submitted for the consideration of the Parties to facilitate a mutually acceptable settlement.

The terms of the settlement shall be communicated in writing by the Chairman to the delegates of the Parties, whom he shall invite to inform him, within the time-limit fixed by him, whether the respective Governments accept the proposed settlement or not.

In making this communication, the Chairman shall explain personally the reasons why, in the Commission's opinion, they advise the Parties to accept the settlement.

If the dispute is only about questions of fact, the Commission shall confine itself to investigating these facts and shall draw up its conclusions in a report.

Article 13

Once the settlement proposed by the Commission is accepted by both Parties, a document embodying the settlement shall be drawn up; it shall be signed by the Chairman, the Secretary of the Commission and the delegates. A copy of the document, signed by the Chairman and the Secretary, shall be sent to each Party.

Article 14

If both Parties or one of them does not accept the settlement proposed and if the Commission deems it useless to try to obtain agreement on different settlement terms, a document shall be drawn up, signed by the Chairman and Secretary, which, without reproducing the settlement terms, shall state that the Parties could not be reconciled.

Article 15

The work of the Commission shall be concluded within six months from the day on which the dispute was brought to its attention, unless the Parties agree otherwise.

Article 16

No statement or communication of the delegates or members of the Commission on the substance of the dispute shall be included in the records of the meetings, unless the delegate or member responsible for the statement or communication consents. On the other hand, the written or oral reports of experts, the records of on-the-spot inspections and the statements of witnesses shall be annexed to the records, unless the Commission decides otherwise.

Article 17

Authentic copies of the records of meetings and their annexes shall be sent to the delegates of the Parties through the Secretary of the Commission, unless the Commission decides otherwise.

Article 18

The Commission's discussions shall be made public only by virtue of a decision taken by the Commission with the assent of both parties.

Article 19

No admission or proposal made during the conciliation proceedings, whether by one of the Parties or by the Commission, may prejudge or affect, in any way, the rights or claims of either Party in the event that the conciliation procedure is not successful. Similarly, the acceptance by either Party of a draft settlement formulated by the Commission shall in no way imply acceptance of considerations of fact or law on which such a settlement may be based.

Article 20

Once the Commission's work is completed, the Parties shall consider whether they will authorize the total or partial publication of the relevant documentation. The Commission may address to them a recommendation for this purpose.

Article 21

During the work of the Commission, each of its members shall receive financial remuneration the amount of which shall be fixed by common agreement between the Parties. The Parties shall each pay half of this remuneration.

Each of the Parties shall pay its own expenses and half of the Commission's joint expenses.

Article 22

At the end of the conciliation, the Chairman of the Commission shall deposit all the relevant documentation in the archives of the Holy See, thus maintaining the reserved nature of this documentation, within the limits indicated in articles 18 and 20 of this annex.

CHAPTER II. ARBITRAL PROCEDURE PROVIDED FOR IN ARTICLE 6 OF THE TREATY OF PEACE AND FRIENDSHIP

Article 23

The Party intending to have recourse to arbitration shall so inform the other in writing. In the same communication, it shall request the constitution of the Arbitral Tribunal, hereinafter called "the Tribunal", shall indicate briefly the nature of the dispute, shall name the arbitrator it has chosen as a member of the Tribunal and shall invite the other Party to reach an arbitral settlement.

The other Party shall co-operate in the constitution of the Tribunal and in the elaboration of the settlement.

Article 24

Except as otherwise agreed by the Parties, the Tribunal shall consist of five members designated in their personal capacity. Each of the Parties shall appoint a member, who may be one of their nationals. The other three members, one of whom shall be Chairman of the Tribunal, shall be elected by common agreement from among the nationals of third States. These three arbitrators must be of different nationality, must not have their habitual residence in the territory of the Parties and must not be employed in their service.

Article 25

If all the members of the Tribunal have not been appointed within a time-limit of three months from the reception of the communication provided for in article 23, the appointment of the members in question shall be made by the Government of the Swiss Confederation at the request of either Party.

The Chairman of the Tribunal shall be designated by common agreement between the Parties within the time-limit specified in the preceding paragraph. If there is no such agreement, the designation shall be made by the Government of the Swiss Confederation at the request of either Party.

When all the members have been designated, the Chairman shall convene them to a meeting in order to declare the Tribunal constituted and to adopt the other agreements necessary for its operation. The meeting shall be held at the place, day and time indicated by the Chairman and the provisions of article 34 of this annex shall be applicable to it.

Article 26

Vacancies which may occur as a result of death, resignation or any other cause shall be filled in the following manner:

If the vacancy is that of a member of the Tribunal appointed by a single one of the Parties, that Party shall fill it as soon as possible and, in any case, within a period of thirty days from the time the other Party invites it in writing to do so.

If the vacancy is that of one of the members of the Tribunal appointed by common agreement, the vacancy shall be filled within a period of sixty days from the time one of the Parties invites the other in writing to do so.

If, within the periods indicated in the foregoing paragraphs, the vacancies in question have not been filled, any of the Parties may request the Government of the Swiss Confederation to fill them.

Article 27

In the event that there is no agreement to bring the dispute before the Tribunal within a period of three months from the time of its constitution, either Party may bring the dispute before it following a written request.

Article 28

The Tribunal shall adopt its own rules of procedure, without prejudice to those which the Parties may have agreed upon.

Article 29

The Tribunal shall have the powers to interpret the settlement and decide on its own competence.

Article 30

The Parties shall co-operate in the work of the Tribunal and shall provide it with all useful documents, facilities and information. Similarly, they shall allow the Tribunal to conduct hearings in their respective territories, to summon and hear witnesses or experts and to practise on-the-spot inspections.

Article 31

The Tribunal shall have the power to order provisional measures designed to safeguard the rights of the parties.

Article 32

When one of the Parties in the dispute does not appear before the Tribunal or refrains from defending its case, the other Party may request the Tribunal to continue the hearing and announce a decision. The fact that one of the Parties is absent or fails to appear shall not be an obstacle to the progress of the hearing or the announcement of a decision.

Article 33

The Tribunal shall base its decisions on international law, unless the Parties have agreed otherwise.

Article 34

The Tribunal's decisions shall be adopted by a majority of its members. The absence or abstention of one or two of its members shall not prevent the Tribunal from meeting or reaching a decision. In the case of a tie, the Chairman shall cast the deciding vote.

Article 35

The Tribunal's decision shall be accompanied by a statement of reasons. It shall mention the number of the members who have taken part in its adoption and the date on

which it was rendered. Each member of the Tribunal shall have the right to have his separate or dissenting opinion added to the decision.

Article 36

The decision shall be binding on the Parties, final and unappealable. Its implementation shall be entrusted to the honour of the nations signing the Treaty of Peace and Friendship.

Article 37

The decision shall be executed without delay in the form and within the time-limits specified by the Tribunal.

Article 38

The Tribunal shall not terminate its functions until it has declared that, in its opinion, the decision has been carried out materially and completely.

Article 39

Unless the Parties have agreed otherwise, the disagreements which may arise between the Parties about the interpretation or the manner of execution of the arbitral decision may be brought by any Party before the Tribunal which rendered the decision. For this purpose, any vacancy occurring in the Tribunal shall be filled in the manner established in article 26 of this annex.

Article 40

Any Party may request the revision of the decision before the Tribunal which rendered it provided that the request is made before the time-limit for its execution has expired, and in the following cases:

1. If the decision has been rendered on the basis of a false or adulterated document;

2. If the decision is wholly or partly the result of an error of fact resulting from the hearings or documentation in the case.

For this purpose, any vacancy occurring in the Tribunal shall be filled in the manner established in article 26 of this annex.

Article 41

Each of the members of the Tribunal shall receive remuneration the amount of which shall be fixed by common agreement between the parties, who shall each pay half of such remuneration.

Each Party shall pay its own expenses and half the joint expenses of the Tribunal.

ANNEX 2

Navigation

NAVIGATION BETWEEN THE STRAIT OF MAGELLAN AND ARGENTINE PORTS IN THE BEAGLE CHANNEL AND VICE VERSA

Article 1

For maritime traffic between the Strait of Magellan and Argentine ports in the Beagle Channel and vice versa, through Chilean internal waters, Argentine vessels shall enjoy navigation facilities exclusively along the following route:

Canal Magdalena, Canal Cockburn, Paso Brecknock or Canal Ocasión, Canal Ballenero, Canal O'Brien, Paso Timbales, north-west arm of the Beagle Channel and the Beagle Channel as far as the meridian 68°36′38.5″ West longitude and vice versa.

The description of the above route is given on annexed map No. III.*

Article 2

The passage shall be navigated with a Chilean pilot, who shall act as technical adviser to the commandant or captain of the vessel.

For the proper designation and embarkation of the pilot, the Argentine authority shall inform the Commander-in-Chief of the Third Chilean Naval Zone, at least forty-eight hours in advance, of the date on which the vessel will begin the navigation.

The pilot shall perform his functions between the point whose geographical co-ordinates are: 54°02.8′ South latitude and 70°57.9′ West longitude and the meridian 68°36′38.5″ West longitude in the Beagle Channel.

In the passage from or to the eastern mouth of the Strait of Magellan, the pilot shall embark and disembark at the pilot station of Bahía Posesión in the Strait of Magellan. In the passage from or to the western mouth of the Strait of Magellan, the pilot shall embark and disembark at the corresponding point indicated in the previous paragraph. He shall be conveyed to and from the previously designated points by Chilean means of transport.

In the passage from or to Argentine ports in the Beagle Channel, the pilot shall embark and disembark in Ushuaia and shall be conveyed from Puerto Williams to Ushuaia or from Ushuaia to Puerto Williams by Argentine means of transport.

Merchant vessels must pay the pilot fees laid down in the Tariff Regulations of the General Department of Maritime Territory and Merchant Navy of Chile.

Article 3

The passage of Argentine vessels shall be continuous and uninterrupted. In case of stoppage or anchorage as a result of *force majeure* along the route indicated in article 1, the commander or captain of the Argentine vessel shall inform the nearest Chilean naval authority.

Article 4

In cases not provided for in this Treaty, Argentine vessels shall be subject to the norms of international law. During the passage, such vessels shall abstain from any activity not directly related to the passage, such as: exercises or practices with arms of any nature; launching, landing or reception of aircraft or military devices on board; embarkation or disembarkation of persons; fishing activities; investigations; hydrographical surveys; and activities which may disturb the security and communication systems of the Republic of Chile.

Article 5

Submarines and any other submersible vessels must navigate on the surface. All vessels shall navigate with their lights on and flying their flags.

Article 6

The Republic of Chile may suspend temporarily the passage of vessels in case of any impediment to navigation as a result of *force majeure* for the duration of such an impediment. The suspension shall take effect as soon as notice is given to the Argentine authority.

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* Maps are not reproduced.

Article 7

The number of Argentine warships which may navigate simultaneously along the route described in article 1 may not exceed three. The vessels may not carry embarkation units on board.

NAVIGATION BETWEEN ARGENTINE PORTS IN THE BEAGLE CHANNEL AND ANTARCTICA AND VICE VERSA; OR BETWEEN ARGENTINE PORTS IN THE BEAGLE CHANNEL AND THE ARGENTINE EXCLUSIVE ECONOMIC ZONE ADJACENT TO THE MARITIME BOUNDARY BETWEEN THE REPUBLIC OF CHILE AND THE ARGENTINE REPUBLIC AND VICE VERSA

Article 8

For maritime traffic between Argentine ports in the Beagle Channel and Antarctica and vice versa; or between Argentine ports in the Beagle Channel and the Argentine exclusive economic zone adjacent to the maritime boundary between the Republic of Chile and the Argentine Republic and vice versa, Argentine vessels shall enjoy navigation facilities for the passage through Chilean internal waters exclusively via the following route:

Paso Picton and Paso Richmond, then following from a point fixed by the co-ordinates 55°21.0′ South latitude and 66°41.0′ West longitude, the general direction of the arc between true 090° and 180°, emerging in the Chilean territorial sea; or crossing the Chilean territorial sea in the general direction of the arc between true 270° and 000°, and continuing through Paso Richmond and Paso Picton.

The passage may be effected without a Chilean pilot and without notice.

The description of this route is given in annexed map No. III.*

Article 9

The provisions contained in articles 3, 4 and 5 of this annex shall apply to passage via the route indicated in the preceding article.

NAVIGATION TO AND FROM THE NORTH THROUGH THE ESTRECHO DE LE MAIRE

Article 10

For maritime traffic to and from the north through the Estrecho de Le Maire, Chilean vessels shall enjoy navigation facilities for the passage of that strait, without an Argentine pilot and without notice.

The provisions contained in articles 3, 4 and 5 of this annex shall apply to passage via this route *mutatis mutandis*.

SYSTEM OF NAVIGATION AND PILOTAGE IN THE BEAGLE CHANNEL

Article 11

The system of navigation and pilotage defined in the following articles shall be established in the Beagle Channel on both sides of the existing boundary between the meridian 68°36′38.5″ West longitude and the meridian 66°25.0′ West longitude indicated on annexed map No. IV.*

* Maps are not reproduced.

Article 12

The Parties shall grant freedom of navigation for Chilean and Argentine vessels along the route indicated in the preceding article.

Along the route indicated merchant vessels flying the flags of third countries shall enjoy the right of passage subject to the rule laid down in this annex.

Article 13

Warships flying the flags of third countries heading for a port of one of the Parties situated along the route indicated in article 11 of this annex must have the prior authorization of that Party. The latter shall inform the other Party of the arrival or departure of a foreign warship.

Article 14

Along the route indicated in article 11 of this annex, in the zones which are under their respective jurisdictions, the Parties undertake reciprocally to develop aids to navigation and to co-ordinate them in order to facilitate navigation and guarantee its security.

The usual navigation routes shall be permanently cleared of all obstacles or activities which may affect navigation.

The Parties shall agree on traffic control systems for the security of navigation in geographical areas where passage is difficult.

Article 15

Chilean and Argentine vessels are not required to take on pilots on the route indicated in article 11 of this annex.

Vessels flying the flags of third countries which navigate from or to a port situated along that route must obey the Pilotage Regulations of the country of the port of departure or destination.

When such vessels navigate between ports of either Party, they shall obey the Pilotage Regulations of the Party of the port of departure and the Pilotage Regulations of the Party of the port of arrival.

Article 16

The Parties shall apply their own regulations in the matter of pilotage in the ports situated within their respective jurisdictions.

Vessels using pilots shall hoist the flag of the country whose regulations they are applying.

Any vessel which uses pilotage services must pay the appropriate fees for these services and any other charge that exists in this respect in the regulations of the Party responsible for the pilotage.

The Parties shall provide pilots with maximum facilities in the performance of their task. Pilots may disembark freely in the ports of either Party.

The Parties shall strive to establish concordant and uniform rules for pilotage.

[Jaime DEL VALLE ALLIENDE] [Dante Mario CAPUTO]

PART III

Case concerning the delimitation of maritime areas between Canada and France

Decision of 10 June 1992

Affaire de la délimitation des espaces maritimes entre le Canada et la République française

Décision du 10 juin 1992

AFFAIRE DE LA DÉLIMITATION DES ESPACES MARITIMES ENTRE LE CANADA ET LA RÉPUBLIQUE FRANÇAISE

DÉCISION DU 10 JUIN 1992

Maritime jurisdiction—Applicable law—Equidistance principle—Equitable principles—Factors relevant in determining an equitable decision—Relevance of geographical factors to maritime delimitation—A claim that equidistance should apply when there are no special circumstances—The principle of equality of States—The principle of equal capacity of islands and mainland countries to generate maritime areas—The notion of "relative reach"—The question of whether the extent of the maritime rights of an island should depend on its political status—The principle of non-encroachment—The question of broad shelf—The relevance of access to and control of fisheries in the disputed area to maritime delimitation

Juridiction maritime — Droit applicable — Principe de l'équidistance — Principes équitables — Facteurs déterminants d'une décision équitable — Pertinence des facteurs géographiques dans la délimitation de frontières maritimes — Argument selon lequel le principe de l'équidistance doit s'appliquer en l'absence de circonstances spéciales — Principe de l'égalité des Etats — Principe de l'égale capacité des îles et pays continentaux d'engendrer des espaces maritimes — Notion d'"étendue relative" — Question de savoir si l'étendue des droits maritimes d'une île doit dépendre de son statut politique — Principe de non-empiètement — Question du plateau étendu — Importance de l'accès aux pêcheries et de leur maîtrise dans la zone en litige aux fins de la délimitation de la frontière maritime

M. Eduardo Jiménez de Aréchaga, président;

M. Oscar Schachter, M. Gaetano Arangio-Ruiz, M. Prosper Weil et M. Allan E. Gotlieb, membres du Tribunal;

M. Felipe H. Paolillo, greffier;

M. P. B. Beazley, expert.

En l'affaire de la délimitation des espaces maritimes entre

le Canada

représenté par

l'honorable Kim Campbell, C. P., C. R., députée, ministre de la justice et procureur général du Canada,

S. E. M. François A. Mathys, ambassadeur, Ministère des affaires extérieures et du commerce extérieur,

comme agent et conseil;

M. Howard Strauss, Ministère des affaires extérieures et du commerce extérieur,

comme agent adjoint et conseil;

M. L. Alan Willis, C. R., Ministère de la justice,

comme conseil principal et conseiller juridique;

M. Ian Binnie, C. R., membre du barreau de l'Ontario, cabinet de McCarthy, Tétrault, Toronto,

M. Derek W. Bowett, C. R., professeur de droit international, titulaire de la chaire Whewell, Collège Queen, Cambridge,

M. Luigi Condorelli, professeur, directeur, département de droit international public, faculté de droit, Université de Genève,

S. E. M. L. Yves Fortier, O. C., C. R., ambassadeur et représentant permanent du Canada aux Nations Unies, cabinet de Ogilvy, Renault, Montréal,

M. Ross Hornby, Ministère de la justice,

Mme Valerie Hughes, Ministère de la justice,

M. Gunther Jaenicke, professeur à l'Université de Francfort-sur-le-Main,

M. Leonard Legault, O. C., C. R., sous-ministre adjoint principal, Ministère des affaires extérieures et du commerce extérieur,

M. Donald McRae, doyen de la section de Common Law, faculté de droit, Université d'Ottawa,

M. Malcolm Rowe, membre des barreaux de l'Ontario et de Terre-Neuve, cabinet de Gowling, Strahy & Henderson, Ottawa,

Mme Jan Schneider, membre des barreaux de New York et du district de Colombia, cabinet de Perley, Robertson, Panet, Hill & McDougall, Washington et Ottawa.

comme conseils;

M. Denis Bilodeau, Ministère de la justice,

M. Charles V. Cole, membre des barreaux de l'Ontario et du Nouveau-Brunswick,

comme conseillers juridiques;

M. John Cooper, consultant, questions de délimitations maritimes, Ottawa,

M. Ron Gélinas, Ministère de l'environnement,

M. David Gray, ingénieur en relevés, service hydrographique canadien, Ministère des pêches et des océans,

comme experts;

Mme Louise Côté, Ministère des pêches et des océans,

M. Michael Shepard, consultant, questions de pêche, Victoria,

M. Edward J. Sandeman, consultant, questions de pêche, St. John's,

comme conseillers scientifiques et techniques;

Mme Anne Brennan, Ministère des affaires extérieures et du commerce extérieur,

comme agent administratif;

Mme Barbara Knight, secrétaire adjointe du cabinet pour les affaires intergouvernementales, Gouvernement de Terre-Neuve et du Labrador,

M. Les Dean, sous-ministre adjoint, Ministère des pêches, Gouvernement de Terre-Neuve et du Labrador,

M. François Mondo, économiste, Ministère des pêches et aquaculture, Gouvernement du Nouveau-Brunswick,

M. Arthur Longard, directeur des ressources maritimes, Ministère des pêches, Gouvernement de la Nouvelle-Ecosse,

M. Pierre Vagneaux, conseiller, Ministère de l'agriculture, des pêcheries et de l'alimentation, Gouvernement du Québec,

comme conseillers;

et

la République française

représentée par

M. Henri Nallet, garde des sceaux, ministre de la justice,

M. Alain Vivien, secrétaire d'Etat auprès du ministre d'Etat, ministre des affaires étrangères,

S. E. M. Jean-Pierre Puissochet, ambassadeur, conseiller d'Etat, directeur des affaires juridiques, Ministère des affaires étrangères,

comme agent et conseil;

M. Marc Plantegenest, président du Conseil général de Saint-Pierre-et-Miquelon,

M. Kamel Khrissate, préfet de Saint-Pierre-et-Miquelon,

comme conseillers spéciaux;

M. Vincent Coussirat-Coustere, professeur de droit international à l'Université de Paris V René Descartes,

M. Pierre-Michel Eisemann, professeur de droit international à l'Université de Paris XIII,

M. Laurent Lucchini, professeur de droit international à l'Université de Paris I Panthéon-Sorbonne,

M. Jean-Pierre Queneudec, professeur de droit à l'Université de Paris I Panthéon-Sorbonne,

M. Tullio Treves, professeur de droit international à la faculté de droit de l'Université de Milan,

comme conseils et avocats;

M. François Alabrune, secrétaire des affaires étrangères, direction des affaires juridiques, Ministère des affaires étrangères,

Mme Jutta Bertram-Nothnagel, assistante de recherche, New York University School of Law,

M. Bernard Dejean de la Bâtie, conseiller diplomatique du gouvernement, Ministère des affaires étrangères,

M. Guirec Doniol, amiral, conseiller du gouvernement pour la défense, Ministère de la défense,

M. Terry Olson, commissaire principal de la marine, direction des affaires juridiques, Ministère des affaires étrangères,

M. André Roubertou, ingénieur général de l'armement (hydrographe) C. R.,

M. Eric van Lauwe, ingénieur des travaux géographiques de l'Etat, division géographique, Ministère des affaires étrangères,

M. François Vervel, administrateur civil, Ministère des départements et territoires d'outre-mer,

comme conseillers et experts;

Mme Isabelle Besson,

Mme Christine Durand,

Mlle Christelle Goujat,

comme assistantes;

le Tribunal, ainsi composé, rend la décision suivante :

1. Le 30 mars 1989, à la suite d'une série de contacts et de négociations, le Gouvernement du Canada et le Gouvernement de la France ont signé un accord (ci-après appelé l'"accord de 1989") instituant un tribunal d'arbitrage chargé de procéder à la délimitation entre les deux pays des espaces maritimes relevant de la France et de ceux relevant du Canada. Le texte de cet accord est le suivant :

ACCORD INSTITUANT UN TRIBUNAL D'ARBITRAGE CHARGÉ D'ÉTABLIR LA DÉLIMITATION DES ESPACES MARITIMES ENTRE LA FRANCE ET LE CANADA

Le Gouvernement de la République française et le Gouvernement du Canada (ci-après dénommés "les Parties");

Considérant que par un accord signé à Ottawa le 27 mars 1972 les Parties ont partiellement délimité les espaces maritimes relevant respectivement du Canada et de la France;

Considérant que, compte tenu des divergences apparues entre elles, les Parties n'ont pu parachever la délimitation;

Considérant que les Parties ont exprimé la volonté commune de résoudre le différend issu de ces divergences en le soumettant à un règlement obligatoire par tierce partie;

Sont convenus de ce qui suit :

Article 1

1. Il est établi un tribunal d'arbitrage (ci-après dénommé "le Tribunal") composé de cinq membres, à savoir :

— M. Prosper Weil, nommé par le Gouvernement français;

— M. Allan E. Gotlieb, nommé par le Gouvernement canadien;

— M. Gaetano Arangio-Ruiz;

— M. Eduardo Jiménez de Aréchaga;

— M. Oscar Schachter.

Le Président du Tribunal sera M. Eduardo Jiménez de Aréchaga.

2. Au cas où un membre du Tribunal nommé par l'une des Parties ferait ou viendrait à faire défaut, cette Partie pourvoira à son remplacement dans un délai d'un mois à compter de la constatation de la vacance par le Tribunal.

3. *a*) Au cas où un autre membre du Tribunal ferait ou viendrait à faire défaut, les Parties pourvoiront d'un commun accord à son remplacement dans un délai de deux mois à compter de la constatation de la vacance par le Tribunal.

b) A défaut d'un accord dans le délai mentionné au paragraphe *a*), les Parties auront recours aux bons offices du Président du Tribunal ou, si c'est le poste du Président qui est vacant, du Secrétaire général de l'ONU.

Article 2

1. Statuant conformément aux principes et règles du droit international applicables en la matière, le Tribunal est prié de procéder à la délimitation entre les Parties des espaces maritimes relevant de la France et de ceux relevant du Canada. Cette délimitation sera effectuée à partir du point 1 et du point 9 de la délimitation visée à l'article 8 de l'Accord du 27 mars 1972 et décrite dans son annexe. Le Tribunal établira une délimitation unique qui condamnera à la fois tous droits et juridictions que le droit international reconnaît aux Parties dans les espaces maritimes susvisés.

2. Le Tribunal décrira le tracé de cette délimitation de façon techniquement précise. A cette fin, la nature géométrique de tous les éléments de ce tracé sera indiquée et la position de tous les points mentionnés sera donnée par leurs coordonnées géographiques dans le système géodésique *North America Datum 1927* (NAD 27).

Le Tribunal indiquera également à seule fin d'illustration le tracé de la délimitation sur une carte appropriée.

3. Le Tribunal désignera, après consultation avec les Parties, un expert technique pour l'aider dans l'exécution des tâches prévues au paragraphe 2 du présent article.

Article 3

1. Le Tribunal ne pourra exercer ses fonctions que s'il est au complet.

2. Le Tribunal sera censé être au complet nonobstant l'existence d'une vacance dans les cas suivants :

a) Lorsqu'il s'agit uniquement de la constatation d'une vacance pour les fins de l'article 1, ou

b) Dans le cas où l'une ou l'autre des Parties négligerait de pourvoir au remplacement d'un juge défaillant tel qu'envisagé au paragraphe 2 de l'article 1.

3. Sous réserve du paragraphe 4 ci-dessous, les décisions du Tribunal seront prises à la majorité de ses membres.

4. En cas de partage égal des voix dans les circonstances prévues au paragraphe 2 de cet article, la voix du Président sera prépondérante.

5. Le Tribunal décidera, sous réserve des dispositions du présent compromis, de sa procédure et de toutes questions relatives à la conduite de l'arbitrage.

Article 4

1. Les Parties, dans un délai de trente jours à compter de la signature du présent compromis, désigneront chacune, pour les besoins de l'arbitrage, un agent et communiqueront le nom et l'adresse de leur agent respectif à l'autre Partie et au Tribunal.

2. Chaque agent ainsi désigné sera habilité à nommer un adjoint pour agir à sa place le cas échéant. Le nom et l'adresse de l'adjoint ainsi nommé seront communiqués à l'autre Partie et au Tribunal.

Article 5

1. Le siège du Tribunal sera fixé à New York City.

2. Le Tribunal, dès sa constitution et après consultation des agents, désignera un greffier.

3. Le Tribunal pourra engager le personnel et s'assurer tous services et matériels qu'il jugera nécessaires.

Article 6

1. La procédure comprendra une phase écrite et une phase orale.

2. Les pièces de la phase écrite comprendront :

a) Un mémoire qui sera soumis par chacune des Parties au Tribunal et à l'autre Partie au plus tard le 1er juin 1990.

b) Un contre-mémoire qui sera soumis par chacune des Parties au Tribunal et à l'autre Partie dans un délai de huit mois après l'échange des mémoires;

c) Toute autre pièce que le Tribunal estimerait nécessaire.

Le Tribunal aura la possibilité de prolonger les délais ainsi fixés à la requête de l'une ou l'autre des Parties.

3. Le Greffier notifiera aux Parties une adresse pour le dépôt de leurs exposés écrits et de tous autres documents.

4. La phase orale suivra la phase écrite et se tiendra à New York City, au lieu et à la date déterminés par le Tribunal après consultation des deux agents.

5. Chaque Partie sera représentée à la phase orale de la procédure par son agent, le cas échéant par son agent adjoint, et par les conseils et experts qu'elle aura désignés à cet effet.

Article 7

1. Les exposés écrits et plaidoiries seront présentés en français ou en anglais; les décisions du Tribunal seront établies dans les deux langues. Des comptes rendus intégraux des audiences seront produits chaque jour dans la langue utilisée lors de chaque intervention.

2. Le Tribunal pourvoira aux traductions et aux interprétations et conservera un compte rendu intégral de toutes les audiences en français et en anglais.

3. Les exposés écrits ne pourront être communiqués au public qu'une fois les audiences commencées. Chaque Partie ne pourra communiquer au public que ses propres exposés.

4. Le public aura accès aux audiences sur invitation de l'une ou l'autre Partie.

5. Chaque Partie pourra communiquer au public les comptes rendus intégraux de ses plaidoiries.

6. Chaque Partie informera l'autre Partie avant de communiquer à titre de preuve ou d'argument toute correspondance diplomatique ou toute autre correspondance confidentielle entre la France et le Canada. Sauf accord entre les Parties, ni l'une ni l'autre Partie n'invoquera à l'appui de sa position ou au détriment de la position de l'autre partie :

a) Les arrangements intérimaires concernant la pêche conclus dans l'attente de la sentence du Tribunal;

b) Les propositions ou contre-propositions faites en vue de parvenir au présent compromis ou aux arrangements intérimaires visés à l'alinéa *a*.

7. Sauf accord entre les Parties, ni l'une ni l'autre Partie ne communiquera à titre de preuve ou d'argument ni ne divulguera publiquement de quelque manière que ce soit la nature ou le contenu des propositions visant à régler la question de la délimitation mentionnée à l'article 2, ou des réponses à ces propositions, faites au cours de négociations ou discussions entreprises depuis janvier 1979.

Article 8

1. La rémunération des membres du Tribunal et celle du greffier seront supportées à égalité par les Parties.

2. Les dépenses générales de l'arbitrage seront supportées à égalité par les Parties. Le greffier consignera le détail de ces dépenses et en rendra compte.

3. Chaque Partie supportera les dépenses encourues par elle dans l'élaboration et la présentation de ses thèses.

Article 9

1. La sentence du Tribunal sera pleinement motivée. Chacun de ses membres aura le droit d'y joindre une opinion individuelle ou dissidente.

2. Le Tribunal notifiera sa sentence aux Parties dans les meilleurs délais.

3. Chaque Partie pourra rendre public le texte de la sentence avec, le cas échéant, le texte de toute opinion individuelle ou dissidente.

Article 10

1. La sentence du Tribunal sera définitive et obligatoire.

2. Chaque Partie pourra, dans les trois mois suivant la notification de la sentence, déférer au Tribunal toute contestation entre les Parties en ce qui concerne l'interprétation et la portée de ladite sentence.

3. Sur demande de l'une ou l'autre Partie le Tribunal pourra dans les trois mois suivant la notification de la sentence corriger les erreurs matérielles qui auraient été commises.

Article 11

Le présent compromis entre en vigueur à la date de sa signature.

EN FOI DE QUOI, les soussignés, dûment autorisés par leurs gouvernements respectifs, ont signé le présent Accord.

FAIT :

à Paris, ce trentième jour de mars 1989,

ET

à Toronto, ce trentième jour de mars 1989,

en double exemplaire, dans les langues française et anglaise, les deux textes faisant également foi.

2. Conformément à l'article 4 de l'accord de 1989, le Gouvernement du Canada a désigné comme agent M. François A. Mathys et le Gouvernement de la République française a désigné comme agent M. Jean-Pierre Puissochet.

3. La première réunion des membres du Tribunal et des agents des Parties a eu lieu à Saint-Jacques de Compostelle le 7 septembre 1989. Lors de cette réunion, et conformément à l'article 5, paragraphe 2, de l'accord de 1989, le Tribunal, après consultation des agents, a désigné comme greffier M. Felipe H. Paolillo. Le Tribunal a aussi décidé de désigner comme expert M. P. B. Beazly.

4. Il est stipulé, à l'article 6 de l'accord de 1989, que la procédure comprendra une phase écrite et une phase orale (par. 1) et que les pièces de la phase écrite comprendront un mémoire qui sera soumis par chacune des Parties au Tribunal et à l'autre Partie au plus tard le 1er juin 1990 et un contre-mémoire qui sera soumis par chacune des Parties au Tribunal et à l'autre Partie dans un délai de huit mois après l'échange des mémoires (par. 2). Dès lors, le 1er juin 1990, l'une et l'autre Partie ont remis au greffier leurs mémoires respectifs et, le 1er février 1990, elles lui ont remis leurs contre-mémoires.

5. Au cours de la procédure écrite, les conclusions ci-après ont été présentées par les Parties :

Au nom du Canada, dans le mémoire et le contre-mémoire :

Vu les faits et les arguments énoncés dans le présent mémoire, *plaise au Tribunal dire et juger que* :

Le tracé de la délimitation unique des espaces maritimes visés par le compromis d'arbitrage conclu entre le Canada et la République française le 30 mars 1989 est défini de la façon suivante :

A partir du point 1 de la délimitation visée à l'article 8 de l'accord du 27 mars 1972 et décrite dans son annexe, la délimitation est effectuée au sud et à l'ouest par des arcs de cercle construits à partir de points situés sur la laisse de basse mer le long de la côte des îles Saint-Pierre-et-Miquelon, de telle sorte que chaque arc ait un rayon de 12 milles marins et se termine au point d'intersection avec un autre arc directement adjacent, jusqu'à un point de latitude 47°14′30″N et de longitude 56°37′53″O; de là par une ligne droite jusqu'au point 9 de la délimitation visée à l'accord de 1972.

Au nom de la République française, dans le mémoire et le contre-mémoire :

Pour l'ensemble des raisons exposées dans le présent mémoire, le Gouvernement de la République française a l'honneur de demander au Tribunal arbitral de dire et juger : la délimitation des espaces maritimes relevant de la France et de ceux relevant du Canada, visée à l'article 2 du compromis du 30 mars 1989, est effectuée de la manière suivante (illustrée par la carte n° 16) :

1) A partir du point 9 de la délimitation visée à l'article 8 de l'accord du 27 mars 1972, la ligne séparative sera constituée, à l'ouest et au sud-ouest de Saint-Pierre-et-Miquelon, par la ligne médiane tracée en prenant pour points de base les points suivants :

Sur les côtes françaises :

— *Sur la Grande Miquelon :* le cap du Nid à l'Aigle, le Grand Bec, le Nid aux Hirondelles, le haut-fond des Veaux Marins, situé à environ cinq milles marins à l'ouest de Miquelon;

— *Sur la petite Miquelon* (Langlade) : la pointe Plate, le cap Bleu, la pointe de l'Ouest (cap Coupé)

— *Sur l'île de Saint-Pierre :* la pointe du Diamant;

Sur les côtes canadiennes :

— *Sur la côte de Terre-Neuve :* Pass Island, Watch Rock (à 8 milles environ au sud du cap La Hune), Lord Island (Penguin Islands), Colombier Island (Penguin Islands), Ramea Southeast Rocks, Ramea Island;

— *Sur la côte du cap Breton :* Scatarie Island;

— *Sur l'île de Sable :* point est de l'île;

2) A partir du point 1 de la délimitation visée à l'article 8 de l'accord du 27 mars 1972, la ligne séparative sera constituée, à l'est et au sud-est de Saint-Pierre-et-Miquelon, par une ligne équidistante déterminée, du côté français, par trois points de base situés sur l'îlot de l'Enfant Perdu (F1), le cap Noir (F2) et la pointe Blanche (F3) sur l'île de Saint-Pierre et, du côté canadien, par deux points de base situés sur Lamaline Shag Rock (C3) et Pointe-aux-Gauls (C2) sur la péninsule de Burin. Cette ligne ira jusqu'au point C (–55°44′55″7, 46°16′44″1). Au-delà de ce point la ligne séparative suivra l'azimut de 164°16′15″;

3) Des lignes seront prolongées sur toute l'étendue des espaces maritimes sur lesquelles les deux Parties peuvent faire valoir des droits.

6. Les pièces de la procédure écrite en l'espèce ayant été déposées dans les délais fixés par l'accord, l'affaire s'est trouvée en état. Les audiences ont eu lieu à New York (article 6, paragraphe 4, de l'accord de 1989) au siège de l'Association of the Bar of the City of New York, du 29 juillet au 23 août 1991. Au cours des audiences, le Tribunal a entendu les conseils des Parties dans l'ordre dont elles étaient convenues, à savoir à commencer par le Canada. Les conseils et conseillers ci-après ont présenté des exposés oraux et donné des avis d'expert au nom des Parties : l'honorable Kim Campbell, M. François Mathys, M. Donald McRae, M. Ian Binnie, M. Yves Fortier, M. Luigi Condorelli, M. Leonard Legault, M. L. Allan Willis et M. Derek Bowett, au nom du Gouvernement du Canada; M. Henri Nallet, M. Jean-Pierre Puissochet, M. Jean-Pierre Quenedeuc, M. Pierre-Michel Eisemann, M. Tullio Treves et M. Laurent Lucchini, au nom du Gouvernement de la République française.

7. Au cours de la procédure orale, les Parties ont présenté leurs conclusions finales, qui étaient identiques à celles qui sont énoncées dans les mémoires et contre-mémoires.

8. On peut faire remonter la genèse du différend à 1966, année pendant laquelle les deux Gouvernements ont échangé des notes verbales et des aide-mémoires qui exposaient leurs positions sur la délimitation du plateau continental au large du Canada et des îles françaises de Saint-Pierre-et-Miquelon. C'est l'octroi par les autorités des deux Parties de permis d'exploration d'hydrocarbures dans la région qui a provoqué cet échange de vues. Dès cette première étape, les Parties ont adopté des positions opposées quant aux critères devant régir la fixation de la ligne de démarcation entre les zones de juridiction canadienne et française au large. Pour la France, la délimitation du plateau continental devait se fonder sur le principe de l'équidistance, tandis que le Canada soutenait que la règle des "circonstances spéciales" était applicable à la

région. Les deux Parties avaient ratifié la convention de 1958 sur le plateau continental, mais la France avait fait plusieurs réserves et celles qui concernaient l'article 6 relatif à la délimitation du plateau continental n'avaient pas été acceptées par le Canada.

9. En janvier 1967, les Parties ont engagé des négociations durant lesquelles elles ont réitéré leurs positions initiales. Au cours de ces négociations des propositions concrètes de compromis ont été faites par chacune des Parties, mais aucune n'a pu être acceptée par l'autre Partie. En août 1967, les Parties se sont réunies une seconde fois, puis les négociations ont été interrompues. Des tentatives de reprise des négociations en 1970 ont échoué. La même année, le Canada a étendu sa mer territoriale à 12 milles marins. La France a fait de même l'année suivante.

10. Une autre série de négociations a eu lieu en mai 1972. Il en est résulté un texte, le "relevé de conclusions", que les négociateurs sont convenus de soumettre à l'approbation de leurs gouvernements respectifs. Ce relevé de conclusions ne contient pas de proposition concrète de délimitation du plateau continental, mais il y est dit que la France accepte le principe d'un plateau continental réduit "propre aux îles Saint-Pierre-et-Miquelon" (paragraphe I) et que le Canada accorde certains avantages économiques en matière d'exploration et d'exploitation des hydrocarbures sur le plateau continental de la région. Ce relevé de conclusions n'a jamais été approuvé.

11. A cette époque, le Canada et la France ont eu plus de succès dans les négociations qu'ils ont engagées en matière de pêcheries. Dans leurs écritures, ainsi qu'au cours de la procédure orale, les Parties ont traité abondamment de l'importance que présentent les pêcheries de la région pour la population établie sur le littoral atlantique du Canada, en particulier pour les habitants de la côte méridionale de Terre-Neuve, et pour la population des îles de Saint-Pierre-et-Miquelon. La France a traditionnellement pratiqué la pêche dans les eaux canadiennes du golfe du Saint-Laurent et dans des zones déterminées, le long du littoral canadien. Le 27 mars 1972, les droits de pêche de la France dans la région ont été redéfinis : les Parties ont alors signé l'"Accord relatif aux relations réciproques entre la France et le Canada en matière de pêche". Cet accord dispose notamment que les navires français auront accès à toute zone de juridiction canadienne étendue, sous réserve d'éventuelles mesures de conservation des ressources, y compris l'établissement de quotas (article 2), et prévoit une élimination progressive, sur une période de 15 ans, des navires français métropolitains pratiquant la pêche dans le golfe du Saint-Laurent (article 3).

12. Au sujet des pêcheurs de Saint-Pierre-et-Miquelon, l'article 4 de cet accord dispose ce qui suit :

> En raison de la situation particulière de Saint-Pierre-et-Miquelon et à titre d'arrangement de voisinage :
>
> *a*) Les embarcations de pêche côtière françaises immatriculées à Saint-Pierre-et-Miquelon peuvent continuer à pêcher dans leurs lieux de pêche traditionnels sur

les côtes de Terre-Neuve, et les embarcations de pêche côtière de Terre-Neuve bénéficient du même droit sur les côtes de Saint-Pierre-et-Miquelon.

b) Les chalutiers français d'une taille maximale de 50 mètres immatriculés à Saint-Pierre-et-Miquelon peuvent, dans la limite d'une dizaine, continuer à pêcher sur les côtes de Terre-Neuve, de la Nouvelle-Ecosse (à l'exception de la baie de Fundy), et dans la zone de pêche canadienne à l'intérieur du golfe du Saint-Laurent, sur un pied d'égalité avec les chalutiers canadiens; les chalutiers canadiens immatriculés dans les ports de la côte atlantique du Canada peuvent continuer à pêcher sur les côtes de Saint-Pierre-et-Miquelon sur un pied d'égalité avec les chalutiers français.

13. Bien que ledit accord traite principalement de questions de pêche, il présente une importance particulière pour le présent différend car son article 8 détermine la ligne qui constitue la limite "des eaux territoriales du Canada et des zones soumises à la juridiction de pêche de la France" dans la région située entre Terre-Neuve et les îles de Saint-Pierre-et-Miquelon. Conformément à l'article 2, paragraphe 1, de l'accord de 1989, les points extrêmes de cette ligne sont ceux à partir desquels le Tribunal doit procéder à la délimitation des espaces marins entre les deux Parties.

14. En 1977, le Canada et la France ont étendu leur juridiction maritime à 200 milles marins au large de leurs côtes respectives. En janvier de cette année, le Canada a déclaré zone de pêche exclusive la zone de 200 milles s'étendant le long de son littoral; le mois suivant, la France a déclaré zone économique soumise à sa juridiction la zone s'étendant à 188 milles au-delà des eaux territoriales de Saint-Pierre-et-Miquelon. Ces faits nouveaux ont aggravé le différend sur la juridiction maritime des deux Etats et ont rendu plus urgente la nécessité de le régler.

15. De nouvelles négociations sur la délimitation des zones de juridiction nationale des deux pays ont eu lieu dans le courant de 1978 et de 1979. Les deux Parties ont insisté sur leurs positions originales, qu'elles ont adaptées compte tenu de la nouvelle situation créée par la tournure que prenait la troisième Conférence des Nations Unies sur le droit de la mer et par l'extension par l'un et l'autre Etat de sa juridiction maritime : selon le Canada, la France n'avait droit qu'à une mer territoriale de 12 milles au large des côtes de Saint-Pierre-et-Miquelon; la France revendiquait le droit à une zone économique exclusive jusqu'à 200 milles marins, dont les limites extérieures devaient être déterminées sur la base de la règle de l'équidistance. En 1979, les négociations ont été interrompues; elles ont repris en 1981. De 1981 à 1985, les Parties se sont réunies plusieurs fois, sans résultat.

16. Le 3 octobre 1980, les Gouvernements des deux pays avaient signé un document portant accord sur les prises annuelles que les navires français étaient autorisés à pêcher dans les eaux canadiennes pendant la période 1981-1986, en application des articles 3 et 4 de l'accord du 27 mars 1972. Mais au milieu des années 1980, des divergences ont surgi entre les Parties relativement à l'application des accords de pêche et à la réglementation de la pêche. Le Canada a accusé la France de dépasser les quotas de pêche autorisés et de menacer ainsi la viabilité des ressources halieutiques dans la région; la France a accusé le Canada

d'appliquer des méthodes de gestion dont le véritable objectif était de la priver de ses droits de pêche dans la région.

17. En janvier 1987, les Parties sont convenues de négocier un compromis d'arbitrage pour l'instauration d'une procédure de règlement par une tierce partie, à laquelle serait soumis le différend sur la frontière maritime, ainsi qu'un accord de pêche à appliquer durant la procédure. D'autre part, les Parties se sont engagées à poursuivre les négociations en vue de fixer des quotas de pêche. Mais les négociations qui devaient conduire à la fixation de quotas pour 1988 ont été rompues. Ce n'est que le 30 mars 1989 que le Canada et la France, avec l'assistance d'un médiateur, M. Enrique Iglesias, ont signé un accord fixant des quotas pour les pêcheurs français dans les eaux canadiennes pour la période de 1989-1991, période qui pouvait être prolongée jusqu'à 1992, au cas où le différend sur la délimitation maritime ne serait pas résolu en 1991. Le même jour, les Parties ont signé un autre accord, celui qui institue le présent Tribunal d'arbitrage chargé de procéder à la délimitation des espaces maritimes entre les deux pays.

I. — La description géographique de la région

18. La région dans laquelle doit s'effectuer la délimitation s'étend au sud de l'île canadienne de Terre-Neuve ainsi qu'à l'est de l'île canadienne du Cap-Breton et de la côte de la masse terrestre de la Nouvelle-Ecosse. Les côtes sont découpées par de nombreuses baies, et beaucoup de petites îles et d'îlots se trouvent au large. A l'est et au sud, la région s'ouvre sur l'océan Atlantique.

19. La côte méridionale de Terre-Neuve s'étend entre le cap Race, tout à l'est, et le cap Ray, à environ 260 milles marins à l'ouest. A partir du cap Race, la côte suit une direction générale ouest sur environ 120 milles marins, jusqu'à l'extrémité sud-ouest de la péninsule de Burin, où la direction générale tourne abruptement vers le nord sur près de 40 milles marins, au travers de l'embouchure de la baie de la Fortune, avant de s'orienter de nouveau vers l'ouest en direction du cap Ray. La baie de Placentia, dont l'embouchure est large de 48 milles marins et qui pénètre sur 60 milles marins à l'intérieur des terres, se trouve, dans la partie orientale de son embouchure, à 45 milles marins à l'ouest du cap Race. Sa côte occidentale est la péninsule de Burin. La baie de la Fortune, au nord de cette péninsule, constitue une autre échancrure profonde, d'environ 30 milles marins de large à son embouchure et de 60 milles marins de long.

20. Le point nord-est de l'île du Cap-Breton se trouve à environ 60 milles marins au sud-ouest du cap Ray, dont il est séparé par le détroit de Cabot, qui donne accès au golfe du Saint-Laurent. La côte orientale de l'île s'étend dans une direction légèrement est à sud sur 67 milles marins, jusqu'à l'île Scatarie, qui se trouve à un mille au large. Là, elle prend une direction sud-ouest sur les 70 milles marins suivants; ensuite, la côte orientale de la masse terrestre de la Nouvelle-Ecosse suit la même direction.

21. L'île de Sable est une île sablonneuse isolée, d'orientation est-ouest, de 22 milles marins de long et de moins d'un mille de large, située à 120 milles marins au sud de l'île Scatarie et à environ 88 milles marins de la masse terrestre de la Nouvelle-Ecosse. Sa superficie est de 33 kilomètres carrés.

22. Les côtes de Terre-Neuve et de l'île du Cap-Breton, de la péninsule de Burin à l'île Scatarie, forment, avec l'embouchure du golfe Saint-Laurent, une concavité prononcée. Le territoire français de Saint-Pierre-et-Miquelon se trouve à l'intérieur de cette concavité, en face de l'embouchure de la baie de la Fortune et à l'ouest sud-ouest de la péninsule de Burin. Il a une superficie de 237 kilomètres carrés et se compose de deux îles principales, Miquelon et Saint-Pierre, de plusieurs îles plus petites et d'îlots ainsi que de nombreux rochers découvrants. L'île de Miquelon, qui suit un axe nord-sud et dont la superficie est de 210 kilomètres carrés, se trouve à environ 27 milles marins au sud de la masse terrestre de Terre-Neuve. Elle comprend deux parties : la Grande-Miquelon, au nord, et Langlade, au sud, qui sont reliées l'une à l'autre par un étroit banc de sable découvert, ou tombolo. Considérée dans son ensemble, l'île a une longueur de 21,6 milles marins du nord au sud, et sa plus grande largeur d'est en ouest (Langlade) est d'environ 7 milles marins. L'île de Saint-Pierre est située à 3 milles marins au sud-ouest de Langlade et à près de 10 milles marins au sud-ouest de la péninsule de Burin. Elle suit une orientation nord-est sud-ouest et a une superficie de 27 kilomètres carrés et une longueur de 4,4 milles marins.

23. Il est admis que, dans la région, le plateau continental constitue un continuum géologique. L'isobathe de 200 mètres se trouve généralement à 120 milles marins environ au large des côtes décrites, sauf lorsqu'elle longe le chenal laurentien, large vallée glaciaire d'environ 50 milles marins de large et d'une profondeur moyenne de 400 mètres, qui s'étend dans une direction sud-est à partir du détroit de Cabot. Ce chenal est une caractéristique secondaire qui n'interrompt pas la continuité du plateau. Plus à l'est et au sud-est de Terre-Neuve, l'isobathe de 200 mètres passe à près de 250 milles marins de la côte. A l'est du chenal laurentien, le plateau continental présente d'autres caractéristiques secondaires sous la forme d'une série de plateaux ou bancs connus sous l'appellation générale de grands bancs de Terre-Neuve. Celui d'entre eux qui est le plus à l'est, et qui est le plus grand, s'appelle le Grand Banc. Plus à l'ouest se trouvent de plus petits bancs : le banc de la Baleine, le banc à Vert, le banc de Saint-Pierre et le banc Burgeo. Le talus continental commence à la profondeur de 200 mètres environ. La marge continentale au large de Terre-Neuve se trouve en général à plus de 200 milles marins des côtes.

II. — La pertinence des facteurs géographiques

24. Les caractéristiques géographiques sont au cœur du processus de délimitation. La Chambre de la Cour internationale de Justice qui a connu de l'affaire de la Délimitation de la frontière maritime dans la région du golfe du Maine a déclaré que les critères équitables à appliquer

"sont à déterminer essentiellement en fonction des caractéristiques de la géographie proprement dite de la région" (*C.I.J. Recueil 1984*, par. 59). Dans l'affaire de la Délimitation du plateau continental entre le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et la République française [affaires des îles Anglo-Normandes (Royaume-Uni France)], le tribunal a déclaré que "ce sont les circonstances géographiques qui déterminent, en premier lieu, s'il convient, dans certains cas, de recourir à la méthode de l'équidistance ou à toute autre méthode de délimitation" (Nations Unies, *Recueil des sentences arbitrales*, vol. XVIII, p. 187, par. 96). Toutefois, les faits géographiques ne déterminent pas par eux-mêmes la ligne à tracer. Il faut appliquer des règles de droit international ainsi que des principes d'équité pour déterminer la pertinence et le poids des caractéristiques géographiques.

25. En règle générale, le processus de délimitation commence par l'identification de ce que la Cour internationale de Justice a appelé "le cadre géographique du différend soumis à la Cour, c'est-à-dire l'ensemble de la région où la délimitation de plateau continental en cause doit s'opérer" [Plateau continental (Tunisie/Libye), *C.I.J. Recueil 1982*, p. 34, par. 17].

26. Dans la présente affaire, les deux Parties ont déterminé, comme région concernée ("*relevant area*"), la concavité géographique formée par Terre-Neuve et la Nouvelle-Ecosse, concavité appelée "Gulf Approches" par le Canada et qualifiée d'"antichambre du golfe" par la France. Les îles françaises de Saint-Pierre-et-Miquelon se trouvent à l'intérieur d'une concavité bordée par le seul littoral canadien.

27. En revanche, les Parties déterminent différemment les côtes qui devraient être considérées comme faisant face à la zone en litige. Le Canada soutient que les côtes canadiennes concernées s'étendent du cap Race au cap Canso et qu'elles comprennent donc : 1) toute la côte méridionale de Terre-Neuve, du cap Race au cap Ray; 2) une ligne de fermeture traversant le détroit de Cabot; et 3) le littoral oriental de l'île du Cap-Breton, de Money Point (près du cap North, à l'est) à l'île Scatarie et, de là, au cap Canso, à l'extrémité nord-est de la masse terrestre de la Nouvelle-Ecosse.

28. La France exclurait d'importants segments du littoral sud de Terre-Neuve, comme la côte entre l'île de Ramea et le cap Ray et les façades orientale et méridionale de la péninsule de Burin, à travers la baie de Placentia. En outre, elle ne considérerait pas comme "côte" la ligne de fermeture à travers le détroit de Cabot. Elle exclurait aussi des segments de côte de la Nouvelle-Ecosse entre le cap North et Low Point, sur l'île du Cap-Breton, et une partie de la ligne entre l'île Scatarie et le cap Canso. A l'appui de ces exclusions, la France a fait valoir qu'il ne faudrait prendre en considération que les côtes qui présentent un rapport entre elles et qui engendrent des projections se rencontrant et se chevauchant.

29. Mais les lignes de côte que la France désire exclure forment la concavité des approches du golfe et elles font toutes face à la région où

doit se faire la délimitation, engendrant des projections qui se rencontrent et se chevauchent, soit latéralement, soit face à face. La ligne de fermeture en travers du détroit de Cabot représente des lignes de côte à l'intérieur du golfe qui sont en opposition directe avec Saint-Pierre-et-Miquelon et qui se trouvent à une distance de moins de 400 milles marins. Pour des raisons semblables, on ne peut non plus ignorer l'échancrure de la baie de Placentia.

30. En revanche, l'argumentation de la France permet d'exclure la ligne canadienne traversant la baie de la Fortune et faisant face au littoral nord et est de Miquelon et de Saint-Pierre, jusqu'à la longitude du point 9 de l'accord de 1972. Les côtes septentrionale et orientale de Miquelon et de Saint-Pierre ne font pas face à la zone en litige et c'est donc à juste titre que le Canada n'en a pas tenu compte lorsque la longueur totale des côtes des îles françaises a été estimée dans son mémoire. Toutefois, il faudrait traiter semblablement la côte canadienne opposée, qui s'étend derrière les îles françaises. Bien que ce segment de côte ait été pris en compte dans l'accord de 1972 pour une ligne de délimitation ininterrompue et continue entre les îles et la masse terrestre, il faudrait l'omettre en calculant la longueur du littoral faisant face à la zone en litige.

31. Par ailleurs, il faut reconnaître que Saint-Pierre-et-Miquelon fait face, aussi bien à l'ouest qu'au sud, à la zone en litige. Cette réalité ne peut pas être représentée par une unique ligne, d'orientation nord-sud, comme le propose le Canada. On peut mieux la représenter, en revanche, par deux segments : l'un du cap du Nid à l'Aigle et à la pointe du Ouest, de 21,6 milles marins, l'autre de la pointe du Ouest au cap Noir sur la Tête de Galantry, de 8,25 milles marins. Le Tribunal constate que, bien qu'il n'y ait pas de différence entre les distances, la méthode employée pour aboutir à ces distances est différente de celle qui est exposée dans la note infrapaginale 28 du mémoire du Canada.

32. La France a considéré comme côte canadienne pertinente une ligne allant de l'île Scatarie à la pointe de l'île de Sable, à 211 milles marins au sud-est. Un simple coup d'œil à la carte montre que cette île se trouve à l'extérieur de la configuration géographique formant les approches du golfe. Dans son mémoire, la France a reconnu que l'île de Sable est "située en avance notable et isolée de toutes les autres côtes au sud-ouest de la région où doit se faire la délimitation" (mémoire de la France, par. 293).

33. Les deux Parties admettent qu'il y a une nette disparité dans la longueur des côtes pertinentes. Mesurées par segments, d'après leurs lignes de direction générale, les lignes de côte respectives ci-dessus définies ont les longueurs suivantes :

Canada 455,6 milles marins
France 29,85 milles marins

Le rapport entre la ligne de côte canadienne et la ligne de côte française est donc de 15.3 à 1, et non de 21 à 1, comme il est dit dans le mémoire du Canada (par. 44).

34. Une autre caractéristique géographique importante concernant les côtes des Parties est la relation entre ces côtes. Selon le Canada, l'étroite contiguïté des côtes des îles françaises et de la côte méridionale de Terre-Neuve signifie qu'elles se trouvent dans une relation d'adjacence. La France fait valoir que, vers l'ouest, les îles sont opposées au littoral canadien qui s'étend de l'autre côté du chenal laurentien et qu'elles sont en particulier dans une relation d'opposition par rapport à l'île du Cap-Breton. La France accepte que, vers le sud et le sud-est, la relation avec la péninsule de Burin et la péninsule d'Avalon est "plutôt latérale".

35. De l'avis du Tribunal, Saint-Pierre et Miquelon sont alignées latéralement par rapport à la côte sud de Terre-Neuve, si bien que la relation dominante et générale est une relation d'adjacence. Des preuves historiques confirment aussi que les îles françaises ont pendant longtemps été considérées comme adjacentes à Terre-Neuve. L'article XIII du Traité d'Utrecht de 1713 inclut implicitement Saint-Pierre et Miquelon dans la clause attribuant à la Grande-Bretagne l'"île de Terre-Neuve, avec les îles adjacentes". La rétrocession à la France, dans le Traité de Versailles de 1783, maintenait les droits de la Grande-Bretagne au sujet de l'île de Terre-Neuve et des îles adjacentes, "à l'exception des îles de Saint-Pierre et Miquelon". Cette exception explicite était nécessaire, sans quoi les deux îles françaises auraient été incluses parmi les îles adjacentes à Terre-Neuve.

III. — Le droit applicable

36. A l'article 2, paragraphe 1, de l'accord de 1989, il est demandé au Tribunal de procéder à une délimitation unique entre les Parties des espaces maritimes relevant de la France et de ceux relevant du Canada. Cette délimitation unique doit commander à la fois tous droits et juridictions que le droit international reconnaît aux Parties dans lesdits espaces maritimes.

37. Les Parties sont convenues de demander une délimitation d'application générale. Comme la Chambre l'a déclaré dans l'affaire de la Délimitation de la frontière maritime dans la région du golfe du Maine, "le droit international ne comporte certes pas de règles qui s'y opposent. D'autre part, dans le cas d'espèce, il n'existe pas d'impossibilité matérielle de tracer une ligne de cette nature" (par. 27). De même, dans la présente affaire, aucun obstacle matériel ne s'oppose à ce que le Tribunal trace une ligne de délimitation unique, comme le lui demande le compromis d'arbitrage.

38. Les Parties sont d'accord sur la norme fondamentale à appliquer en l'espèce, norme qui exige qu'il soit procédé à la délimitation conformément à des principes équitables, ou à des critères équitables, en tenant compte de toutes les circonstances pertinentes, afin de parvenir à un résultat équitable. Cette norme fondamentale repose sur la prémisse suivant laquelle l'accent est mis sur l'équité et toute méthode obligatoire est rejetée. En revanche, les Parties ne sont pas d'accord sur

les principes ou critères qui devraient régir la solution équitable du différend; elles mettent l'accent sur des principes ou critères différents.

39. Dans son mémoire, la France se réfère à la convention de 1958 sur le plateau continental, ratifiée par les deux Parties, et elle soutient que l'article 6 de cette convention a un rôle à jouer dans la présente affaire et que la ligne pouvant résulter de l'application de l'article 6, qui fait mention de l'équidistance, est un élément dont il faut tenir compte *pour déterminer le caractère équitable de la ligne à tracer.*

40. Le Tribunal adhérera à la jurisprudence bien établie suivant laquelle, lorsqu'il s'agit de procéder à une délimitation unique ou d'application générale, l'article 6 de la convention sur le plateau continental n'a pas "de valeur contraignante . . . même . . . entre des Etats . . . parties à la convention" (*C.I.J. Recueil 1984*, par. 124). Dans l'affaire du Golfe du Maine, la Chambre, rejetant une thèse du Canada, a déclaré que l'article 6 n'était pas applicable à la délimitation unique et des fonds marins et de la colonne d'eau, car "une semblable interprétation ferait en définitive de la masse d'eau maritime surjacente au plateau continental un simple accessoire de ce plateau" (*C.I.J. Recueil 1984*, par. 119).

41. En outre, si l'article 6 est invoqué en vue d'en tirer argument en faveur de l'équidistance, il faut faire observer que cet article ne vise pas l'équidistance tout court, mais l'équidistance à défaut de circonstances spéciales. En 1977, dans la décision rendue en l'affaire arbitrale anglo-française, la mention des circonstances spéciales à l'article 6 a été interprétée comme signifiant que "l'obligation d'appliquer le principe de l'équidistance est toujours subordonnée à la condition : 'à moins que des circonstances spéciales ne justifient une autre délimitation' " (Nations Unies, *Recueil des sentences arbitrales*, vol. XVIII, par. 70). Le tribunal a ajouté que la constatation de l'existence de circonstances spéciales "est très largement une question d'appréciation qui doit être résolue à la lumière des circonstances géographiques et autres" (ibid.).

42. Au cours de la présente procédure, les Parties se sont référées à plusieurs reprises à la manière dont ont été traitées les îles Anglo-Normandes dans la décision rendue en 1977 dans l'arbitrage anglo-français. Le Tribunal ne considère pas que cette décision constitue un précédent pour la présente affaire. La situation dans le cas des îles Anglo-Normandes est fondamentalement différente de celle du cas présent, en raison de la proximité du littoral anglais. Le tribunal qui a rendu cette décision a considéré lesdites îles comme une caractéristique secondaire aux fins d'une délimitation entre deux masses terrestres, les côtes étant approximativement de même longueur.

IV. — Les principes ou critères invoqués par la France

43. Pour s'opposer aux conclusions du Canada, qui n'octroient à Saint-Pierre-et-Miquelon qu'une bande de 12 milles marins à compter des lignes de base dans les espaces qui n'ont pas encore été délimités, la France s'appuie sur deux principes de base : le principe de l'égalité souveraine des Etats et le principe de l'égale capacité des îles et des

pays continentaux d'engendrer des espaces maritimes. Se fondant sur ces motifs, la France affirme que non seulement la proposition du Canada est inéquitable, mais qu'elle dissocie le titre juridique à des espaces maritimes de l'opération de délimitation. Le Gouvernement français relève que la proposition canadienne dénierait aux îles françaises toute zone économique exclusive et tout plateau continental. Il soutient que les deux îles sont assimilées de la sorte à des "rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique" propre, alors que, d'après l'article 121, paragraphe 3, de la convention de 1982 sur le droit de la mer, seuls de tels rochers "n'ont pas de zone économique exclusive ni de plateau continental".

44. Pour répondre à la thèse française selon laquelle toutes les côtes ont un titre égal, le Canada introduit la notion d'"étendue relative"; il soutient que toutes les côtes n'ont pas nécessairement un titre égal et que leur projection vers le large est proportionnelle à leur longueur. Le Canada affirme que des côtes de longueur limitée doivent avoir un prolongement réduit par rapport à celui de côtes plus longues.

45. Il ne fait pas de doute que la différence de longueur de toutes les côtes pertinentes des Parties est un important facteur à prendre en compte par une délimitation équitable, afin d'éviter des résultats disproportionnés et, ensuite, de vérifier le caractère équitable de la solution finalement adoptée. Le Tribunal ne saurait cependant accepter la thèse suivant laquelle certains segments de côte peuvent avoir une projection augmentée ou diminuée en fonction de leur longueur. L'étendue des projections vers le large dépendra, dans chaque cas, des circonstances géographiques; par exemple, la projection au large d'une côte particulière, si courte soit cette dernière, peut atteindre 200 milles pour autant qu'elle n'entre pas en conflit avec d'autres côtes pouvant obliger à en réduire l'étendue.

46. Un autre argument du Canada auquel la France répond en invoquant le principe de l'égalité des Etats est celui qui fait valoir que Saint-Pierre-et-Miquelon n'engendre pas de plateau continental qui lui soit propre puisque, du point de vue physique, les îles sont superposées au plateau continental canadien lui-même. Or, dans cette région, le plateau continental est un continuum caractérisé par l'unité et l'uniformité de l'ensemble des fonds marins, "de l'Arctique à la Floride", comme l'a admis le Canada et comme l'a reconnu la Chambre de la Cour internationale de Justice dans l'affaire du Golfe du Maine. Dans cette dernière affaire, la Chambre est parvenue à la conclusion suivante : "Le plateau continental de l'ensemble de cette zone ne forme qu'une partie fondamentalement indistincte du plateau continental de la côte orientale de l'Amérique du Nord" (par. 45). Comme il s'agit d'un seul et même plateau, on ne saurait le considérer comme exclusivement canadien. Chaque segment de côte a sa part de plateau.

47. Lorsqu'il invoque la structure physique des fonds marins, le Canada ne reconnaît pas dûment que la notion du plateau continental, de même que la notion voisine de prolongement naturel, "malgré son

origine physique, a acquis tout au long de son évolution le caractère d'une notion juridique de plus en plus complexe" [affaire du Plateau continental (Jamahiriya arabe libyenne/Malte), *C.I.J. Recueil 1985*, par. 34]. Il ne faut pas oublier non plus que la structure physique des fonds marins cesse d'être importante lorsque, comme en l'espèce, le but est de procéder à une délimitation unique, d'application générale, aussi bien des fonds marins que des eaux surjacentes.

48. En soulignant que la délimitation doit être effectuée entre deux Etats également souverains et que leur souveraineté est indivisible, la France cherche à réfuter un autre argument qu'a invoqué le Canada, à savoir que le statut de dépendance politique des îles françaises par rapport à la France métropolitaine est un facteur justifiant des droits maritimes moins étendus que si ces îles constituaient un Etat insulaire indépendant.

49. De l'avis du Tribunal, rien ne permet de soutenir que l'étendue des droits maritimes d'une île dépend de son statut politique. Aucune distinction n'est faite à cet égard par l'article 121, paragraphe 2, de la convention de 1982 sur le droit de la mer ni par les dispositions correspondantes des conventions de 1958 sur la mer territoriale et la zone contiguë et sur le plateau continental.

50. Le Canada a fait observer que, dans l'affaire Libye/Malte, la Cour internationale de Justice a reconnu qu'on ne pouvait accorder de poids à Malte, en tant qu'Etat indépendant, qu'en tant que dépendance située au large et a conclu qu'un Etat insulaire indépendant ne pouvait être mis, "à cause de son indépendance, dans une situation moins favorable" (*C.I.J. Recueil 1985*, par. 72). Or, ces termes donnent à penser à une égalité de traitement plutôt qu'à un traitement amoindri pour les îles politiquement dépendantes.

51. Le Canada a fait observer en outre que, en 1977, dans l'affaire anglo-française, le tribunal arbitral avait souligné l'importance de la distinction entre îles dépendantes et îles indépendantes en accordant du poids au statut des îles Anglo-Normandes, comme îles du Royaume-Uni et non comme Etats semi-indépendants. Cette distinction n'a pas cours dans la présente affaire puisque toutes les îles en cause dans la procédure doivent être considérées comme des îles de la France ou du Canada, respectivement, et qu'aucune d'elles n'est un Etat indépendant ou semi-indépendant.

52. En 1977, dans l'affaire anglo-française, le tribunal arbitral a fait une utile distinction en déclarant que "le cas des îles Anglo-Normandes" devait, à son avis, être distingué "de celui des rochers ou des petites îles" en raison de la présence de certains facteurs tels qu'"une population importante et une économie agricole et commerciale substantielle" (par. 184). Certains de ces facteurs se retrouvent dans le cas de Saint-Pierre-et-Miquelon. Sans comparer, et moins encore mettre sur le même pied, l'importance économique ou politique des territoires en présence en l'espèce, il faut conclure, d'un point de vue strictement juridique, que Terre-Neuve, bien que d'une superficie beaucoup plus

grande que Saint-Pierre-et-Miquelon, est également une île qui n'a pas le statut d'Etat politiquement indépendant ou semi-indépendant.

53. Une autre question se pose en raison de la thèse du Canada fondée sur certaines stipulations convenues dans des déclarations mutuelles échangées entre le roi de Grande-Bretagne et le roi de France lorsqu'ils signèrent le Traité de Versailles de 1783. Aux termes de l'article IV de ce traité, les îles de Saint-Pierre et Miquelon "sont cédées en toute propriété, par le présent traité, à sa Majesté Très Chrétienne", c'est-à-dire au roi de France. Mais les déclarations qui furent ensuite échangées disposent que le roi de Grande-Bretagne,

> en cédant les îles de Saint-Pierre et de Miquelon à la France, les regarde comme cédées afin de servir réellement d'abri aux pêcheurs français, et dans la confiance entière que ces possessions ne deviendront point un objet de jalousie entre les deux nations.

54. Les Parties ont adopté des points de vue divergents sur la question de savoir si ces dispositions pouvaient être considérées comme étant encore en vigueur et comme restreignant les droits de la France à des espaces maritimes au-delà des eaux territoriales. Alors que le Canada fait valoir que ces clauses sont encore en vigueur et limitent les droits de la France à des espaces maritimes au-delà des eaux territoriales, la France rejette fermement cette prétention.

55. De l'avis du Tribunal, ces dispositions, à supposer même qu'elles soient encore en vigueur, ne sauraient être raisonnablement interprétées comme limitant les droits de la France à des espaces maritimes en vertu du droit de la mer contemporain. Le fait que les îles sont dites servir "réellement d'abri" aux pêcheurs français n'a pas été interprété par la Grande-Bretagne ou, au cours des années suivantes, par le Canada, comme limitant le droit de Saint-Pierre-et-Miquelon à constituer une base pour les activités de pêche de ses habitants. La clause selon laquelle les îles ne deviendront pas "un objet de jalousie" entre les Parties ne peut être plausiblement interprétée comme signifiant qu'il faut, pour cause de "jalousie", dénier à la France les droits que lui reconnaît le droit international contemporain.

V. — Les principes ou critères invoqués par le Canada

56. Le Canada s'oppose à la thèse en faveur d'une délimitation fondée sur l'équidistance en invoquant deux principes ou critères mis au point par la jurisprudence : le principe de non-empiétement et le critère équitable dit de la nécessité de tenir compte de la longueur des côtes afin d'éviter des résultats disproportionnés.

57. Le principe du non-empiétement a été introduit par l'arrêt que la Cour internationale de Justice a rendu dans les affaires du Plateau continental de la mer du Nord. Dans le dispositif de cette décision, la Cour a déclaré que la délimitation doit s'opérer "de manière à attribuer, dans toute la mesure possible, à chaque Partie la totalité des zones du plateau continental qui constituent le prolongement naturel de son territoire sous la mer et n'empiétent pas sur le prolongement naturel du

territoire de l'autre" (*C.I.J. Recueil 1969*, par. 101, C, 1). En 1985, dans l'affaire Libye/Malte, la Cour s'est référée au

> principe . . . du non-empiétement d'une partie sur le prolongement naturel de l'autre, qui n'est que l'expression négative de la règle positive selon laquelle l'Etat côtier jouit de droits souverains sur le plateau continental bordant sa côte dans toute la mesure qu'autorise le droit international selon les circonstances pertinentes (*C.I.J. Recueil 1985*, par. 46).

58. Tel que décrit par le Canada, le principe du non-empiétement signifie que la délimitation doit laisser à un Etat les espaces qui constituent le prolongement naturel ou l'extension vers le large de ses côtes, de telle sorte que la délimitation doit éviter tout effet d'amputation de ces prolongements ou extensions vers le large. Cela signifie que, pour une délimitation d'application générale, la notion de prolongement naturel vise la projection des côtes vers le large, aussi bien en ce qui concerne les fonds marins que la colonne d'eau. Le Canada allègue que, dans le cas présent, celui des deux côtes adjacentes, dont l'une est concave, les îles françaises constituant une sorte de protubérance, la ligne d'équidistance proposée par la France dévierait latéralement au travers de la façade côtière de la côte la plus concave, amputant le Canada d'espaces situés juste en face de ses côtes. Dans les situations de ce genre, soutient le Canada, l'emploi de l'équidistance aurait pour effet, pour reprendre les termes employés par la Cour internationale de Justice en 1969, "d'attribuer à un Etat des zones prolongeant naturellement le territoire d'un autre Etat" (*C.I.J. Recueil 1969*, par. 44). Dans cette dernière affaire, la Cour a ajouté qu'il faut éviter d'en arriver là car la délimitation "ne doit pas empiéter sur ce qui est le prolongement naturel du territoire d'un autre Etat" (ibid., par. 85).

59. Le Canada ajoute qu'un simple coup d'œil à la carte montre que la ligne d'équidistance ravit une trop grande part de l'espace vers le large du littoral sud de Terre-Neuve, la ligne s'incurvant et provoquant une amputation inéquitable de la projection naturelle de segments de cette côte sur les espaces maritimes se trouvant juste en face du littoral sud de Terre-Neuve. D'après le Canada, cette côte est la plus importante pour la délimitation, car les côtes se projettent frontalement, dans la direction à laquelle elles font face, comme l'a reconnu la jurisprudence. Le Canada fait observer que l'arrêt rendu en 1969 dans les affaires du Plateau continental de la mer du Nord se fonde manifestement sur une notion directionnelle du prolongement naturel; la Cour parle du prolongement naturel du point de vue des espaces se trouvant directement en face d'une côte, et toute la décision repose en pratique sur ce principe. Le Canada ajoute que, dans l'affaire du Golfe du Maine, il a fait valoir une projection radiale fondée sur le critère de la distance, mais que son argumentation n'a pas été acceptée par la Chambre de la Cour internationale de Justice.

60. Le second critère équitable qu'invoque le Canada pour rejeter l'équidistance est celui de la nécessité d'éviter une disproportion entre la longueur des côtes pertinentes des Parties et les espaces maritimes déclarés correspondre à chaque côte. Le Canada soutient que la pré-

misse sur laquelle repose la pertinence du facteur de la proportionnalité est que les côtes constituent les fondements juridiques du titre et que c'est d'après leur configuration et leur projection dans la mer qu'on détermine l'étendue de la juridiction maritime d'un Etat. Le Canada allègue que, la délimitation étant une opération juridique, elle doit refléter le fondement juridique du titre à des droits au large, titre qui trouve son expression concrète par la voie de la géographique côtière. Le Canada réaffirme que c'est au moyen de la côte, du point de contact entre la terre et la mer, que la souveraineté territoriale sur la masse terrestre engendre des droits au large; il rappelle que, dans l'affaire Libye/Malte, la Cour a déclaré que la souveraineté sur la masse terrestre réalise concrètement ces droits "par la façade maritime de cette masse terrestre, c'est-à-dire par son ouverture côtière" (*C.I.J. Recueil 1985*, par. 49).

61. Le Canada relève que, d'après la jurisprudence bien établie, le facteur de la proportionnalité joue un double rôle dans l'opération de délimitation : d'une part, déterminer préliminairement l'étendue relative des côtes en présence, de manière à choisir la méthode de délimitation à adopter; d'autre part, comparer ultérieurement le rapport de la longueur des côtes, ce qui constituera un moyen de vérifier l'équité de la délimitation.

62. Le Canada invoque la proportionnalité à la fois comme critère et comme l'une des circonstances pertinentes à prendre en considération dans le processus de choix d'une méthode de délimitation. Il soutient que la nette disparité de la longueur totale des côtes pertinentes conduit à rejeter l'équidistance en tant que méthode à appliquer en l'espèce pour aboutir à un résultat équitable. Le Canada allègue que rien ne peut justifier l'emploi de cette méthode lorsque la relation d'adjacence s'accompagne d'une disparité si nette des longueurs des côtes que l'équidistance conduirait inévitablement à un résultat disproportionné. Le Canada va même plus loin; il est opposé à l'emploi d'une ligne d'équidistance provisoire comme point de départ, en affirmant qu'il ne sert à rien de commencer l'opération en recourant à une méthode qui ne présente à première vue aucune chance de succès dans la configuration géographique à laquelle elle doit être appliquée.

63. Le Tribunal estime que, dans l'arrêt qu'elle a rendu en 1985 dans l'affaire Libye/Malte, la Cour internationale de Justice a bien exposé l'usage qu'il convient de faire de la proportionnalité en tant que moyen de vérifier l'équité. Au paragraphe 66, la Cour définit ainsi le rôle que doit jouer la proportionnalité :

> "Mais se livrer à des calculs de proportionnalité pour vérifier un résultat est une chose; c'en est une autre que de prendre acte, durant l'opération de délimitation, de l'existence d'une très forte différence de longueur des littoraux et d'attribuer à cette relation entre les côtes l'importance qu'elle mérite, sans chercher à la quantifier, ce qui ne serait approprié que pour évaluer à postériori les rapports entre les côtes et les surfaces."

Au paragraphe 58, la Cour expose ainsi le rôle que la proportionnalité ne doit pas jouer :

"... retenir le rapport entre ces longueurs comme déterminant en lui-même la projection en mer et la superficie du plateau continental qui relève de chaque Partie, c'est aller bien au-delà d'un recours à la proportionnalité pour vérifier l'équité du résultat et corriger une différence de traitement injustifiée imputable à une certaine méthode. Si la proportionnalité pouvait être appliquée ainsi, on voit mal quel rôle toute autre considération pourrait encore jouer."

VI. — EXAGÉRATION DES THÈSES DES DEUX PARTIES

64. Chacune des Parties, lorsqu'elle réfute les thèses adverses, a tendance à contredire les principes mêmes qu'elle a invoqués à l'appui de ses propres positions. C'est ainsi que le Canada, pour s'opposer à la ligne française d'équidistance, invoque le principe du non-empiétement et la nécessité d'amputer ses projections côtières vers le sud et vers l'ouest, tout en niant, avec sa proposition d'enclave, toute projection au-delà de la mer territoriale aux ouvertures côtières de Saint-Pierre-et-Miquelon vers le sud et vers l'ouest. De même, la France ne tient pas dûment compte du principe de l'égalité des Etats et de l'égalité de titres des îles lorsqu'elle nie, avec sa ligne d'équidistance, toute projection vers le large à d'importants segments du littoral sud de Terre-Neuve.

65. Le Tribunal estime qu'aucune des solutions proposées ne fournit ne serait-ce qu'un point de départ pour la délimitation. La conclusion du Tribunal est semblable à celle à laquelle la Chambre de la Cour internationale de Justice est parvenue dans l'affaire du Golfe du Maine, à savoir qu'elle devait "se consacrer à cette étape finale du mandat à elle confié et formuler sa propre solution indépendamment des propositions des Parties" (*C.I.J. Recueil 1984*, par. 190).

VII. — LA SOLUTION

66. Pour parvenir à un résultat équitable, il faut examiner séparément deux secteurs différents de la région maritime où doit être effectuée la délimitation. Cette distinction entre deux projections séparées vers le large des côtes des îles françaises a été suggérée dans le mémoire de la France, où il est dit : "la zone dans laquelle doit intervenir la délimitation... comporte deux secteurs nettement distincts, l'un à l'ouest et au sud-ouest des îles..., l'autre au sud et au sud-est de ces îles" (par. 307).

67. Pour ce qui est du premier secteur, qu'on peut appeler le secteur de la projection occidentale vers le large, toute extension vers le large des côtes françaises au-delà de la mer territoriale entraînerait inévitablement un certain empiétement sur la projection vers le large en direction du sud à partir de points situés sur la côte méridionale de Terre-Neuve et une certaine amputation de cette projection. Les deux Parties reconnaissent cependant qu'"une certaine amputation est peut-être inhérente à toute délimitation" et qu'un tel effet est "inhérent à la simple présence des îles du littoral de Terre-Neuve" (mémoire du Canada, par. 392; contre-mémoire du Canada, par. 428); il a aussi été déclaré que toute solution "amputera... inéluctablement une partie de leurs droits. Tel est l'esprit de toute opération de délimitation." (Contre-mémoire de la France, par. 370.)

68. Le Tribunal a déjà conclu que la proposition particulière d'enclave, présentée par le Canada, n'est pas équitable car elle nie aux îles tout espace maritime au-delà des espaces qui lui sont déjà reconnus comme mer territoriale. Une extension limitée de l'enclave au-delà de la mer territoriale dans ce secteur occidental répondrait dans une certaine mesure à l'attente raisonnable par la France d'un titre au-delà de l'étroite bande de mer territoriale, quand bien même cette extension provoquerait quelque empiétement sur certaines projections canadiennes vers le large.

69. Pour le secteur occidental, une solution raisonnable et équitable consisterait à accorder à Saint-Pierre-et-Miquelon 12 milles marins supplémentaires à partir de la limite de sa mer territoriale, pour sa zone économique exclusive. Cet espace sera de l'étendue de la zone contiguë visée à l'article 33 de la convention sur le droit de la mer, lequel donne à l'Etat côtier juridiction pour prévenir les infractions à ses lois et règlements douaniers, fiscaux, sanitaires ou d'immigration. A partir du point 9 de la délimitation visée à l'article 8 de l'accord du 27 mars 1972, la ligne de délimitation sera une ligne droite de direction sud-ouest jusqu'au point d'intersection le plus lointain d'arcs de cercle d'un rayon de 12 milles marins, centrés sur les points les plus proches des lignes de base décrites ci-après. De là, ce sera une ligne d'équidistance entre le Canada et les îles françaises jusqu'à une position de 24 milles marins à compter des points les plus proches de ces lignes de base, d'où elle suivra une limite de 24 milles marins mesurés à partir des points les plus proches de la ligne de base des îles françaises, jusqu'à la limite occidentale du second secteur. Dans le cas du Canada, la ligne de base sera celle qui est donnée dans le *Territorial Sea and Fishing Zones Geographical Co-ordinates Order* (mémoire du Canada, annexe E-2) et, dans le cas des îles françaises, la ligne de base sera la laisse de basse mer des îles, îlots, rochers découvrants ou hauts-fonds découvrants.

70. Dans le second secteur, vers le sud et le sud-est, la situation géographique est complètement différente. Les îles françaises ont une ouverture côtière vers le sud, à laquelle ne fait obstacle aucune côte canadienne opposée ou alignée latéralement. Comme elle dispose d'une telle ouverture côtière, la France a pleinement droit à une projection frontale en mer, vers le sud, jusqu'à ce qu'elle atteigne la limite extérieure de 200 milles marins, aussi loin que tout autre segment de la côte méridionale adjacente de Terre-Neuve. Rien ne permet de prétendre que la projection frontale de Saint-Pierre-et-Miquelon dans cette zone devrait prendre fin à la limite de 12 milles de la mer territoriale. Par ailleurs, il ne faut pas laisser une telle projection vers le large empiéter sur une projection frontale parallèle de segments adjacents du littoral sud de Terre-Neuve ou amputer leur projection.

71. Pour parvenir à ce résultat, il faut mesurer la projection vers le sud d'après la largeur de l'ouverture côtière des îles françaises dans ce même sens. Une application équilibrée des principes et critères invoqués par les Parties conduit donc à la solution consistant en un second espace maritime pour Saint-Pierre-et-Miquelon, dans le secteur sud,

s'étendant sur une distance de 188 milles marins à partir d'une limite de 12 milles marins mesurés à compter des lignes de base déjà décrites, son axe étant orienté plein sud le long du méridien se trouvant à mi-chemin entre les deux méridiens indiqués ci-dessous, ses limites orientale et occidentale étant formées par des lignes parallèles à cet axe et sa largeur étant déterminée par la distance entre les méridiens passant par le point le plus oriental de l'île de Saint-Pierre et le point le plus occidental de l'île de Miquelon respectivement, mesurée à la latitude moyenne de ces deux points, soit 10,5 milles marins approximativement. A partir du point nord-est de la limite ainsi décrite, jusqu'au point 1 mentionné dans l'accord de 1972, la délimitation sera une limite de 12 milles marins mesurés à partir des points les plus proches de la ligne de base des îles françaises.

72. Le Canada a soutenu que, pour déterminer la projection en mer, vers le sud, de Saint-Pierre-et-Miquelon, il faut tenir compte de la projection vers l'est à partir des côtes de l'île du Cap-Breton, 140 milles marins plus loin, ou à partir d'autres points plus éloignés, en Nouvelle-Ecosse. Les deux Parties ont envisagé, à ce sujet, ce qu'aurait pu être la situation si la Nouvelle-Ecosse avait été un Etat indépendant. Le Canada a soutenu qu'il ne saurait obtenir moins de droits maritimes pour la seule raison que la Nouvelle-Ecosse est une province canadienne.

73. Les objections opposées par le Canada à la projection vers le sud du littoral de Saint-Pierre-et-Miquelon, fondées sur une projection vers l'est à partir de la Nouvelle-Ecosse et de l'île du Cap-Breton, ne sont pas impérieuses. Géographiquement, les côtes de la Nouvelle-Ecosse ont des espaces océaniques ouverts pour une projection sans encombre vers le large, au sud, conformément à la tendance, relevée par le Canada, qu'ont les côtes à se projeter frontalement, dans la direction à laquelle elles font face. Dans l'hypothèse d'une délimitation entre Saint-Pierre-et-Miquelon et la Nouvelle-Ecosse exclusivement, comme si le littoral sud de Terre-Neuve n'existait pas, il est probable qu'on recourrait à l'équidistance corrigée, les côtes étant opposées. Dans ce cas, peut-on se demander, la zone revenant hypothétiquement à la Nouvelle-Ecosse atteindrait-elle, vers le sud, les espaces maritimes relevant de Saint-Pierre-et-Miquelon ?

74. Compte tenu de la situation géographique, le Tribunal ne voit aucune incompatibilité ou contradiction dans le fait d'admettre une projection limitée vers l'ouest de la côte occidentale de Saint-Pierre-et-Miquelon, ainsi qu'une projection totale jusqu'à 200 milles de la côte méridionale des îles françaises, à laquelle aucun obstacle ne s'oppose.

VIII. — La question du plateau étendu

75. Dans son mémoire (par. 146), le Gouvernement français indique que, des informations disponibles quant aux profils des fonds marins dans la région située au sud de Saint-Pierre-et-Miquelon, il apparaît que la marge continentale s'étend dans la région sur plus de 200 milles marins. Invoquant l'article 76, paragraphe 4 *a*, ii, de la Convention de 1982 sur le droit de la mer, la France revendique des droits sur le

plateau continental au-delà de 200 milles, en affirmant que son plateau continental dans la région s'étend jusqu'au rebord externe de la marge continentale. C'est pourquoi le Gouvernement français prie le Tribunal d'arbitrage de décider que les lignes de délimitation fixées par lui devraient être prolongées afin de délimiter aussi le plateau continental des Parties au-delà de 200 milles. Il est ajouté, dans le mémoire de la France, que, si le Tribunal ne prolongeait pas la ligne de délimitation au moins jusqu'à la limite des 200 milles canadiens, sa décision aurait pour résultat de dénier à la France un droit à un plateau continental étendu, jusqu'au rebord externe de la marge continentale (par. 321).

76. Pour sa part, le Canada déclare dans son contre-mémoire que, bien que la marge continentale située au large de Terre-Neuve se situe généralement au-delà de 200 milles marins, le point où la France fait valoir sa revendication peut, en fait, se trouver au-delà du rebord de cette marge déterminée conformément à l'article 76 de la convention de 1982 sur le droit de la mer, si bien que la revendication de la France ne repose sur aucune base raisonnable. Le Canada ajoute qu'il n'accepte pas l'assertion de la France concernant l'emplacement du rebord externe de la marge continentale et fait observer que la France elle-même ne connaît pas l'emplacement du rebord externe de la marge, qui est fondamental pour sa thèse, ainsi qu'en témoigne le fait qu'elle n'a pas complété les lignes de cette revendication sur la carte 16 de son mémoire (contre-mémoire du Canada, par. 68, et note infrapaginale 61).

77. Une question préalable se pose au sujet de la compétence du Tribunal pour se prononcer sur la divergence de vues des Parties sur le point de savoir si le plateau continental s'étend au-delà de 200 milles dans la région concernée. Aux termes du compromis d'arbitrage, le Tribunal est prié "de procéder à la délimitation entre les Parties des espaces maritimes relevant de la France et de ceux relevant du Canada".

78. Toute décision par laquelle le Tribunal reconnaîtrait aux Parties des droits sur le plateau continental au-delà de 200 milles marins ou rejetterait de tels droits constituerait une décision impliquant une délimitation non pas "entre les Parties" mais entre chacune d'elles et la communauté internationale, représentée par les organes chargés de l'administration et de la protection de la zone internationale des fonds marins (les fonds marins situés au-delà de la juridiction nationale) qui a été déclarée patrimoine commun de l'humanité.

79. Le Tribunal n'est pas compétent pour procéder à une délimitation touchant aux droits d'une partie qui n'est pas présente devant lui. A ce sujet, le Tribunal relève que, conformément à l'article 76, paragraphe 8, et à l'annexe II de la convention de 1982 sur le droit de la mer, une commission appelée "Commission des limites du plateau continental" doit être constituée en vue d'examiner les revendications et les informations que lui soumettront les Etats côtiers et de leur faire des recommandations. Conformément à cette disposition, seules les "limites [du plateau continental] fixées par un Etat côtier sur la base de ces recommandations sont définitives et de caractère obligatoire".

80. De toute évidence, refuser de se prononcer sur la thèse française en se fondant sur l'absence de compétence du Tribunal ne saurait signifier ni ne saurait être interprété comme préjugeant, acceptant ou refusant les droits que la France, ou le Canada, peut revendiquer sur un plateau continental au-delà de 200 milles marins.

81. Le désaccord entre les Parties sur la situation de fait, autrement dit sur le point de savoir si, à l'emplacement pertinent, les données géologiques et géomorphologiques rendent l'article 76, paragraphe 4, applicable ou non, n'a pas élucidé au cours de la procédure orale, ce qui renforce le Tribunal dans sa décision de s'abstenir de se prononcer sur le fond de la question. Un tribunal ne peut pas parvenir à une décision en supposant, par pure hypothèse, que de tels droits existeront en fait. C'est à juste titre qu'il est dit, dans le mémoire de la France, dans un contexte différent, qu'"il est sûr que le Tribunal ne peut tabler sur des actes futurs au contenu et à la date inconnus de lui" (mémoire de la France, par. 47).

82. Il découle des considérations ci-dessus que le Tribunal n'est compétent que pour procéder à une délimitation jusqu'à la limite extérieure de 200 milles marins, à savoir la délimitation unique applicable simultanément à la zone économique exclusive et au plateau continental normal des Parties, autrement dit le plateau qui n'est pas étendu conformément à l'article 76, paragraphe 4, de la convention de 1982. En refermant à la limite extérieure de 200 milles marins les deux lignes parallèles représentant la projection vers le large, en direction du sud, de l'ouverture côtière de Saint-Pierre-et-Miquelon, le Tribunal se conforme strictement au compromis d'arbitrage, aux termes duquel il "établira une délimitation unique qui commandera à la fois tous droits et juridictions que le droit international reconnaît aux Parties dans les espaces maritimes susvisés". Cette disposition donne mandat pour établir une ligne de délimitation unique qui s'applique à la fois aux fonds marins et aux eaux surjacentes dans la zone qui est l'objet de la délimitation.

IX. — L'IMPORTANCE DES PÊCHERIES

83. Il ressort à l'évidence des pièces de la procédure écrite que l'accès aux pêcheries dans la zone en litige et la surveillance de celles-ci sont au centre du différend sur la délimitation. Les Parties ont toutes deux mis l'accent sur le fait que leurs ressortissants respectifs dépendent économiquement de la pêche dans la région et toutes deux considèrent que la délimitation est un élément décisif de la sauvegarde des intérêts légitimes de leurs communautés de pêcheurs. Par ailleurs, les Parties s'accordent fondamentalement pour dire que les critères régissant la délimitation doivent être recherchés d'abord dans les faits géographiques. Comme il l'a déjà déclaré, le Tribunal partage ce point de vue. Le Tribunal reconnaît en particulier qu'il n'a pas été prié de répartir les ressources sur la base des besoins ou d'autres facteurs économiques et qu'il n'a pas non plus été autorisé à le faire. En conséquence, la dépendance économique et les besoins n'ont pas été pris en considération dans le processus de délimitation exposé ci-dessus.

84. Le Tribunal ne saurait toutefois ignorer les arguments et les informations fournis par l'une et l'autre Partie au sujet de l'incidence des droits et des pratiques de pêche sur le bien-être économique des populations les plus touchées par la délimitation. Après s'être prononcé sur la délimitation conformément aux facteurs géographiques, le Tribunal a encore l'obligation de s'assurer que la solution à laquelle il a abouti n'est pas "radicalement inéquitable", pour reprendre les termes employés par la Chambre de la Cour internationale de Justice dans l'affaire du Golfe du Maine. Cette chambre a défini ce qui est "radicalement inéquitable" comme ce qui est "susceptible d'entraîner des répercussions catastrophiques pour la subsistance et le développement économique des populations des pays intéressés" (*C.I.J. Recueil 1984*, par. 237).

85. Dans la présente affaire, les faits soumis au Tribunal indiquent que la démarcation envisagée n'aura pas d'incidence radicale sur la composition actuelle de la pêche dans la région. Comme les deux Parties l'ont souligné à maintes reprises au cours de la procédure, la délimitation ne porte pas atteinte à leurs droits de pêche, lesquels continueront à être régis par l'accord du 27 mars 1972. Cet accord se caractérise principalement par le fait que chaque Partie doit laisser les ressortissants de l'autre Partie accéder aux zones de pêche soumises à sa juridiction, sur une base de complète réciprocité. Ce principe s'entend sous réserve "d'éventuelles mesures de conservation des ressources, y compris l'établissement de quotas".

86. Le tribunal arbitral qui a connu de l'affaire La Bretagne a noté, dans la décision qu'il a rendue le 17 juillet 1986, que l'accord du 27 mars 1972 "appartient à la catégorie des accords de réciprocité, en ce sens qu'il implique un échange de prestations de même nature entre les deux Etats contractants qui se concèdent mutuellement des droits de pêche dans des secteurs relevant de leur juridiction respective en la matière" (paragraphe 29 de la décision). Bien que le présent Tribunal n'ait pas pour tâche d'appliquer ou d'interpréter l'accord du 27 mars 1972, il convient de relever que les droits que les Parties tiennent actuellement de cet accord s'appliqueront aux zones de pêche qui sont l'objet de la délimitation[1]. Une interprétation restrictive de l'accord sur ce point ne se justifierait pas. Comme l'a relevé le tribunal qui a connu de l'affaire La Bretagne :

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[1] Les articles 1 et 2 de cet accord sont ainsi rédigés :

Article 1

Le Gouvernement français renonce aux privilèges établis à son profit en matière de pêche par la convention signée à Londres le 8 avril 1904 entre le Royaume-Uni et la France. Le présent accord remplace les dispositions conventionnelles antérieures relatives à la pêche des ressortissants français au large de la côte Atlantique du Canada.

Article 2

En contrepartie, le Gouvernement canadien s'engage, dans le cas de changement au régime juridique des eaux situées au-delà des limites actuelles de la mer territoriale et des zones du Canada sur la côte Atlantique, à reconnaître aux ressortissants français le droit de pêche dans ces eaux, sous réserve d'éventuelles mesures de conservation des ressources, y compris l'établissement de quotas. Le Gouvernement français s'engage de son côté à accorder la réciproque aux ressortissants canadiens au large de Saint-Pierre-et-Miquelon.

Dans un traité de ce type il ne paraît pas justifié de voir dans les droits d'une des Parties l'énoncé d'un principe et, dans les droits de l'autre, l'énoncé d'une exception qui justifierait, à ce titre, une interprétation restrictive (par. 30).

87. Dans la mesure où chacune des Parties possède des ressources halieutiques de valeur dans les zones soumises à sa juridiction, l'accord sur les droits réciproques a un caractère vraiment mutuel. La délimitation sur laquelle porte la décision du Tribunal n'aura pas pour effet de priver l'une ou l'autre des Parties des droits de pêche qu'elle tient actuellement de l'accord de 1972. Si, par le passé, les Parties ont eu des différends portant sur des quotas ou sur des réclamations pour excès de pêche, l'accord n'en est pas pour autant privé de son utilité essentielle. Les deux Etats ont reconnu la valeur de la réciprocité, s'agissant de ressources halieutiques qu'ils ont partagées pendant des siècles. Ils admettent l'un et l'autre que des quotas doivent être fixés uniquement pour conserver les ressources halieutiques. Il est dans l'intérêt déclaré de l'un ou de l'autre de maintenir leur coopération et la réciprocité. Le Tribunal ne doute pas que, en se conformant de bonne foi à l'accord de 1972, les Parties réussiront à gérer et à exploiter de manière satisfaisante les ressources halieutiques de la région. Dans ces conditions, la solution que le Tribunal a adoptée en se fondant sur les faits géographiques, sur des critères équitables et sur les principes du droit n'aura assurément pas de répercussions catastrophiques pour l'une ou l'autre Partie.

88. En raison de la géographie de la région concernée, les lignes de délimitation fixées par le Tribunal engendrent des zones économiques qui, à certains points, se croisent ou s'interceptent. Ce fait, comme celui qui est examiné au paragraphe 87 ci-dessus, n'aura pas non plus d'effet adverse en ce qui concerne la navigation ou d'autres droits et devoirs des Parties. Il est évident, et les deux Parties le reconnaissent, que les droits et devoirs en matière de navigation ou dans d'autres domaines, à l'intérieur de la zone économique de 200 milles, sont régis par les règles pertinentes du droit international. Dans la procédure écrite aussi bien que dans la procédure orale, les deux Parties ont souligné l'importance qu'elles attachent au principe de la liberté de la navigation dans la zone de 200 milles, garantie par l'article 58 de la convention de 1982, disposition qui représente à n'en pas douter le droit international coutumier, au même titre que l'institution de la zone de 200 milles elle-même. Bien que cette question ne soit pas en litige dans le présent arbitrage, le Tribunal prend note de la concordance de vues des Parties à son sujet.

XI. — LES RESSOURCES MINÉRALES*

89. Les Parties ont aussi fait connaître au Tribunal l'intérêt qui est le leur pour l'exploitation éventuelle d'hydrocarbures dans les zones où leurs revendications se chevauchent. Les deux gouvernements ont délivré concurremment quelques permis d'exploration mais, après des

* La section X n'existe pas dans le texte original.

protestations réciproques, aucun forage n'a été entrepris. Dans les circonstances actuelles, le Tribunal n'a aucune raison de considérer que les éventuelles ressources minérales ont une incidence sur la délimitation.

90. La question des ressources en hydrocarbures a aussi été portée à l'attention du Tribunal par référence à un document appelé "relevé des conclusions", aux termes duquel la France accepterait une zone réduite de plateau continental au large de Saint-Pierre-et-Miquelon en échange de l'octroi par le Canada à des sociétés françaises de permis d'exploitation d'hydrocarbures et de gaz dans la zone de plateau continental canadien. Ce document a été adopté *ad referendum* par les négociateurs en 1972, en vue d'être soumis à l'approbation des deux gouvernements, mais cette approbation n'a pas été donnée. La France a ensuite porté le relevé à l'attention du tribunal arbitral qui a connu de l'affaire anglo-française en 1977.

91. De l'avis du Tribunal, on ne peut tirer aucune conclusion du relevé aux fins de la présente délimitation. Ce relevé ne se réfère qu'au plateau continental et il n'intéresse donc pas la délimitation d'application générale qui est ici exigée. En outre, il n'a pas reçu l'approbation nécessaire des deux gouvernements et n'a donc pas le statut d'accord entre eux.

XII. — La vérification des résultats

92. Dans l'affaire Libye/Malte, la Cour internationale de Justice a déclaré ce qui suit :

> De l'avis de la Cour, aucune raison de principe n'empêche d'employer le test de proportionnalité, à peu près de la manière dont on l'a fait en l'affaire Tunisie/Libye, et qui consiste à déterminer les 'côtes pertinentes' et les zones pertinentes de plateau continental, à calculer les rapports arithmétiques entre les longueurs de côte et les surfaces attribuées et finalement à comparer ces rapports, afin de s'assurer de l'équité d'une délimitation . . . [Plateau continental (Jamahiriya arabe libyenne/Malte), *C.I.J. Recueil 1985*, p. 53, par. 74].

La Cour a cependant constaté qu'il y avait en l'espèce des difficultés pratiques telles qu'il était inapproprié d'appliquer le test de proportionnalité de cette manière et qu'il était en particulier difficile, en pratique, de déterminer les côtes pertinentes et les zones pertinentes. Tel n'est pas le cas en la présente affaire. Les côtes pertinentes ont été déterminées et leur rapport a été établi au paragraphe 33 ci-dessus.

93. Certes, en ce qui concerne la superficie de la zone pertinente, les Parties ont présenté des chiffres différents, dont certains reposent sur une hypothèse. Mais l'expert géographique qui assiste le Tribunal a calculé que la superficie de la zone pertinente aux fins de la vérification des résultats, telle que cette zone a été déterminée par le Tribunal, est proche de 63 000 milles marins carrés. Le Tribunal considère que ce calcul est bien fondé. En effet, pour comparer ce qui est comparable, il faut tenir compte non seulement de la projection de 200 milles accordée à la France, mais aussi de la zone canadienne résultant d'une projection identique étendant la zone pertinente vers l'est le long de l'arc de 200 milles de Terre-Neuve jusqu'à un point situé en plein sud du cap Race,

et comprenant ainsi toute la zone économique engendrée au sud par la côte méridionale de Terre-Neuve. La limite méridionale de la zone pertinente consiste en une ligne reliant le cap Canso à l'intersection des limites de 200 milles marins à partir de l'île du Cap-Breton et des îles françaises, puis en la limite de 200 milles marins à partir des îles françaises jusqu'à son intersection avec la limite de 200 milles marins à partir de Terre-Neuve, puis en cette dernière, jusqu'à un point situé en plein sud du cap Race. Sur cette base, les espaces relevant en fait de chacune des Parties sont : pour le Canada, de 59 434 m.m.^{2} et pour les îles françaises, de 3 617 m.m.^{2}, soit au total une zone de 63 051 m.m.^{2}, ce qui donne un rapport d'environ 16,4 à 1 et confirme donc qu'il n'y a certainement pas disproportion entre les espaces relevant de chacune des Parties. En conséquence, les exigences du test de proportionnalité, en tant qu'aspect de l'équité, ont été satisfaites.

Par ces motifs,

LE TRIBUNAL D'ARBITRAGE, par trois voix contre deux (pour : M. Jiménez de Aréchaga, président, et MM. Schachter et Arangio-Ruiz, membres du Tribunal; contre : MM. Weil et Gotlieb, membres du Tribunal), trace la ligne de délimitation ci-après :

Cette ligne est définie par les lignes géodésiques qui, à partir du point 9 de la délimitation visée à l'article 8 de l'accord du 27 mars 1972, relient les points dont les coordonnées sont les suivantes :

	Latitude nord	*Longitude ouest*
A	47° 14′ 28,3″	56° 37′ 52,0″
B	47° 12′ 59,0″	56° 39′ 45,1″
C	47° 07′ 46,6″	56° 52′ 06,3″
D	46° 58′ 58,6″	57° 05′ 48,4″

Du point D, elle est définie par des segments d'arcs de cercle de 24 milles marins de rayon, centrés sur les points les plus proches des lignes de base des îles françaises, segments qui se coupent aux points dont les coordonnées sont les suivantes :

E	46° 47′ 54,5″	56° 59′ 12,3″
F	46° 36′ 35,1″	56° 53′ 55,3″
G	46° 33′ 14,9″	56° 50′ 16,5″
H	46° 27′ 28,4″	56° 41′ 17,3″
I	46° 23′ 52,6″	56° 30′ 24,0″

puis elle continue le long du segment suivant jusqu'à :

J	46° 22′ 03,8″	56° 24′ 15,6″

Du point J, elle est définie par les lignes géodésiques reliant les points dont les coordonnées sont les suivantes :

K	45° 23′ 04,0″	56° 24′ 07,6″
L	44° 24′ 04,0″	56° 24′ 00,1″
M	43° 25′ 04,5″	56° 23′ 52,9″

Du point M, elle est constituée par le segment d'un arc de cercle de 200 milles marins de rayon, centré sur le point le plus proche de la ligne de base des îles françaises, jusqu'à :

N	43° 24′ 58,0″	56° 09′ 26,0″

Du point N, elle est définie par les lignes géodésiques reliant les points dont les coordonnées sont les suivantes :

O	44° 27′ 45,0″	56° 09′ 18,3″
P	45° 30′ 30,0″	56° 09′ 10,2″
Q	46° 33′ 17,2″	56° 09′ 01,6″

Du point Q, elle est définie par des segments d'arcs de cercle de 12 milles marins de rayon, centrés sur les points les plus proches des lignes de base des îles françaises, qui se coupent aux points dont les coordonnées sont les suivantes :

R	46° 34′ 52,0″	56° 01′ 45,1″
S	46° 37′ 01,7″	55° 57′ 12,2″

puis elle continue le long du segment suivant jusqu'au point de l'accord de 1972.

Toutes les coordonnées sont exprimées selon le système géodésique North American Datum (1983).

FAIT en anglais et en français au New York Bar Association Building, à New York, le 10 juin 1992, les deux textes faisant également foi, en trois exemplaires, dont l'un sera déposé aux archives du Tribunal et les autres seront transmis respectivement au Gouvernement de la République française et au Gouvernement du Canada.

Le Président
Eduardo JIMÉNEZ DE ARÉCHAGA

Le Greffier
Felipe PAOLILLO

MM. Weil et Gotlieb, membres du Tribunal, joignent à la décision du Tribunal d'arbitrage l'exposé de leur opinion dissidente.

E. JIMÉNEZ DE ARÉCHAGA
F. PAOLILLO

RAPPORT TECHNIQUE PRÉSENTÉ AU TRIBUNAL
par M. P. B. Beazley

1. La description complète de la ligne de délimitation, de même que les coordonnées géographiques nécessaires, est donnée dans la décision et ne figure pas dans le présent rapport. Tous les calculs ont été faits sur l'ellipsoïde en utilisant le North American Datum (1983) [voir mémoire du Canada, p. 14, n 13], l'ellipsoïde associé étant celui du Geodetic Reference System (1980). Il a été fait usage du mille marin international de 1 852 mètres.

2. Les positions des points de base pertinents ont été rélevées sur des cartes marines canadiennes, selon les indications données au tableau du paragraphe 4 ci-après. Comme toutes les coordonnées ont été exprimées par les Parties, dans leurs conclusions, à 0,1 seconde d'arc près (voir contre-mémoire du Canada, p. 271 et 272; mémoire de la France, p. 286), j'ai fait de même.

3. Les coordonnées énumérées dans l'accord du 27 mars 1972 sont données approximativement et ne sont exprimées qu'à la seconde d'arc près. A la page 271 de son contre-mémoire, le Canada a apporté aux coordonnées citées les corrections du Datum, mais la France, dans son mémoire, ne donne de coordonnées ni pour le point 1 ni pour le point 9. En outre, le point 1, tel qu'il est décrit dans l'accord et corrigé suite au changement de Datum, ne se trouve pas exactement sur un arc de 12 milles centré sur l'Enfant Perdu. On peut donc présumer que, si les coordonnées avaient été données à 0,1 seconde d'arc près, elles auraient été légèrement différentes. Il n'existe pas de données permettant de déterminer les coordonnées exactes de ces points, tels qu'ils ont été convenus en 1972; d'ailleurs, il n'a pas été demandé au Tribunal d'entreprendre cette tâche.

4. Dans le mémoire de la France (p. 286), les coordonnées d'une ligne d'équidistance sont énumérées. Les points de base déterminants sont désignés par des lettres, mais leurs coordonnées ne sont pas données. Dans le contre-mémoire du Canada (p. 272), les coordonnées de la plupart des points de base utilisés pour les îles françaises sont données, mais, si on les compare aux coordonnées de la ligne d'équidistance de la France, on constate qu'elles ne sont pas identiques à ces dernières. On s'y attendrait au seul vu des échelles des cartes marines, même si les détails utilisés étaient les mêmes. J'ai déterminé mes propres valeurs pour les coordonnées des points de base pour les îles françaises, tels que définis dans la décision, bien qu'elles ne diffèrent que légèrement de celles que le Canada a employées. Les valeurs du NAD 83 utilisées pour les divers points de base qui déterminent la délimitation, ainsi que leurs sources, sont les suivantes :

N°	*Nom*	*Latitude nord*	*Longitude ouest*	*Source*
C1	Watch Rock	47° 23′ 09,1″	56° 50′ 02,3″	Voir par. 69
C2	Lord Island	47° 22′ 30,1″	56° 58′ 55,3″	de la décision
F1	Pte à l'Abbé	47° 07′ 32,9″	56° 23′ 30,1″	
F2	Veaux Marins	47° 02′ 09,9″	56° 31′ 02,8″	carte
F3	Pte Plate (extrême W) ..	46° 49′ 16,5″	56° 24′ 19,2″	marine
F4	Pte Plate (extrême SW) .	46° 49′ 14,5″	56° 24′ 17,4″	canadienne
F5	Cap Bleu	46° 47′ 36,5″	56° 22′ 21,3″	4626
F6	Pte du Ouest (îlot SW) ..	46° 46′ 58,7″	56° 21′ 00,9″	
F7	Rocher découvrant de Pointe du Diamant	46° 44′ 55,2″	56° 13′ 41,6″	
F8	Ilot au large de Tête du Petit Havre	46° 45′ 14,3″	56° 10′ 30,3″	carte marine
F9	Ile aux Chasseurs	46° 45′ 41,5″	56° 09′ 15,5″	canadienne
F10	L'Enfant perdu	46° 47′ 03,7″	56° 06′ 45,4″	4643
FE	Cap Noir	46° 46′ 03,2″	56° 08′ 59,6″	

5. Les corrections à apporter aux coordonnées indiquées sur les cartes marines pour les adapter au NAD 83 ont été extraites des renseignements fournis par l'agent du Canada dans la lettre qu'il a adressée au greffier en date du 2 juillet 1991. Il ressort notamment de ces renseignements que les corrections à apporter à la carte marine canadienne 4633 à grande échelle, carte sur laquelle figurent les points de base du Canada, sont diverses et grandes et que la carte marine 4015 à plus petite échelle (1:350 000) devrait être utilisée. Selon les renseignements fournis par M. David H. Gray, du Service hydrographique du Canada, les coordonnées pour les points de base canadiens pertinents, qui sont énumérées dans le *Territorial Sea and Fishing Zones Geographical Co-ordinates Order*, ont été relevées sur cette carte à plus petite échelle. Après avoir vérifié ces coordonnées, je leur ai apporté les corrections appropriées pour la carte marine 4015, qui sont de + 0,1″ en latitude et de – 2,7″ en longitude (moins représente une diminution de la longitude ouest).

6. Les corrections à apporter aux cartes marines 4626 et 4643 étaient de – 0,1″ en latitude et de – 2,9″ en longitude.

7. Les points de base déterminants pour les points d'angle ou d'intersection le long de la ligne de délimitation sont énumérés ci-après :

Point d'angle	*Point de base*
A	C1, F1
B	C1, F1, F2
C	C1, C2, F2
D	C2, F2
E	F2, F3
F	F3, F4
G	F4, F5
H	F5, F6
I	F6, F7
J, M & N	F7
Q	F8
R	F8, F9
S	F9, F10

8. Les limites occidentale et orientale de la projection vers le sud exposées au paragraphe 71 de la décision sont déterminées par pointe Plate (F3) et cap Noir (FE), ce qui donne :

Latitude moyenne	46° 47′ 39,9″ N
Longitude moyenne	56° 16′ 39,4″ W

La distance entre les méridiens passant par F3 et FE à la latitude moyenne est de 19 502,5 mètres, si bien que tout point des limites occidentale ou orientale doit se trouver approximativement à 9 751,25 mètres à l'ouest ou à l'est, respectivement, du méridien central de 56° 16′ 39,4″ ouest.

9. Les limites décrites par le Tribunal pour ce secteur sont de "petits cercles" et ne sont ni des lignes géodésiques ni des lignes de rhumb. Une ligne géodésique constitue la meilleure approximation, mais il a fallu, étant donné que les positions avaient été indiquées à 0,1 seconde d'arc près, déterminer deux points intermédiaires le long de chaque limite de manière à réduire la divergence des géodésiques à partir des petits cercles, pour obtenir une valeur proportionnelle au degré de précision cité. Il s'agit des points K, L, O et P.

10. La ligne de délimitation a été reportée sur des copies de la carte marine canadienne 4490. Bien qu'elle ne soit plus publiée, cette carte a été choisie car c'est la carte à la plus grande échelle qui englobe la région. Les points d'angle de la ligne ont été marqués sur la carte en fonction de leurs coordonnées géographiques conformes au NAD (83), telles qu'elles sont données dans la décision; toutefois, en raison des différences de Datum sur la carte marine, il semble que les cinq premiers points (9 à D) se trouvent plus loin de la côte de Terre-Neuve que ce n'est le cas en réalité.

P. B. BEAZLEY

OPINION DISSIDENTE DE M. PROSPER WEIL

1. Le compromis demandait au tribunal d'arbitrage de procéder à la délimitation des espaces maritimes relevant de la France et du Canada "conformément aux principes et règles du droit international applicables en la matière". Je ne parviens pas à identifier quels principes et règles pourraient justifier en droit la délimitation décidée, et je crains que la sentence ne compromette à certains égards le développement du droit de la délimitation maritime que l'arrêt *Libye/Malte* avait mis de manière spectaculaire sur la voie d'une plus grande sécurité juridique. Telle est la raison majeure qui m'a conduit, à mon très vif regret, à me séparer de mes collègues, bien que par ailleurs je sois d'accord avec la sentence sur de nombreux points, dont plusieurs de grande importance.

I

2. Si j'ai voté contre la sentence, c'est essentiellement parce que la délimitation à la bizarre forme de champignon à laquelle elle aboutit ne me paraît pas reposer "sur une base de droit"[1]. Laissant de côté certaines objections de caractère ponctuel et plus secondaire, c'est sur cette question que je concentrerai mes observations.

3. Pour ce qui est, tout d'abord, de la tête du champignon[2], le tribunal explique qu'"[u]ne extension limitée de l'enclave au-delà de la mer territoriale . . . répondrait dans une certaine mesure à l'attente raisonnable par la France d'un titre au-delà de l'étroite bande (*belt*) de mer territoriale, quand bien même cette extension provoquerait quelque empiétement sur certaines projections canadiennes vers le large" (par. 68). Une "solution raisonnable et équitable" lui paraît en conséquence de reconnaître à la France à l'ouest des îles, en plus de sa mer territoriale, une zone économique de 12 milles, cette largeur étant justifiée par référence à celle de la zone contiguë mentionnée à l'article 33 de la

[1] *Golfe du Maine, C.I.J. Recueil 1984*, p. 278, par. 59.

[2] Si je recours à cette terminologie botanique plutôt qu'à la division en deux secteurs qui figure dans la sentence (par. 66 et suiv.), c'est parce que cette division ne correspond pas à la distinction entre la partie septentrionale qui surmonte le corridor et le corridor lui-même. Dans la sentence, c'est seulement la partie occidentale de la tête du champignon qui est qualifiée de premier secteur (ou secteur occidental). Le second secteur, quant à lui, est défini comme comprenant le sud et le sud-est, mais en réalité il couvre essentiellement le sud (c'est-à-dire le corridor); le sud-est est intéressé seulement par la dernière phrase du paragraphe 71, qui décrit le petit segment de la ligne joignant le sommet oriental du corridor au point 1 de la délimitation de 1972. Cette distinction en deux secteurs ne correspond pas, on le voit, à celle que j'opère, pour les besoins du raisonnement, entre la tête et le pied du champignon. J'ajoute que, contrairement à ce qui semble résulter du paragraphe 66 de la sentence, les deux secteurs retenus par le tribunal ne coïncident pas avec ceux dont la France avait proposé la distinction et qui correspondaient, l'un au segment occidental de la ligne d'équidistance revendiquée par la France, à partir du point 9, et l'autre au segment oriental de la ligne d'équidistance revendiquée par la France, à partir du point 1.

convention sur le droit de la mer de 1982 (par. 69). Plusieurs questions — qui sont autant d'objections — viennent alors à l'esprit.

4. Premièrement : pourquoi la largeur de la zone économique française est-elle déterminée par référence à la largeur de la zone contiguë, alors que la convention de 1982, sur laquelle s'appuie la sentence, attribue précisément des largeurs différentes à ces deux zones (pas plus de 24 milles des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale pour la zone contiguë : art. 33; pas plus de 200 milles pour la zone économique exclusive : art. 57) ? La finalité des deux zones et les pouvoirs reconnus à l'Etat côtier dans chacune d'elles sont, au demeurant, trop différents pour que la largeur de la zone contiguë puisse servir de fondement à la largeur de la zone économique attribuée à la France à l'ouest de ses îles.

5. Deuxièmement : pourquoi le tribunal s'est-il cru obligé de s'excuser en quelque sorte d'avoir consenti à une "extension limitée" de 12 milles ? Car c'est bien ainsi qu'il procède lorsqu'il explique qu'il faut répondre dans une certaine mesure aux expectatives raisonnables de la France à des espaces maritimes au-delà de sa mer territoriale, fût-ce au prix d'un certain empiétement sur la projection de la côte méridionale de Terre-Neuve et d'une certaine amputation de cette projection (par. 67-68). Comme si le point de départ axiomatique de la délimitation confiée au tribunal était de sauvegarder le plus possible les projections des côtes canadiennes en réduisant au strict minimum les projections des côtes françaises ! Comme si la France n'avait pas un droit — un droit véritable — à un espace maritime au-delà de la mer territoriale, et non pas seulement une "attente raisonnable" !

6. Troisièmement : à peine octroyée, l'"extension limitée" accordée à la France se voit immédiatement rognée. Car sur une bonne partie de son parcours la ligne de 24 milles mesurée à partir des lignes de base françaises déborderait la ligne d'équidistance entre Terre-Neuve et Saint-Pierre-et-Miquelon, et il n'était pas question — là-dessus je partage le sentiment du tribunal — de permettre à la zone française d'aller au-delà de la ligne d'équidistance; la France ne le demandait d'ailleurs pas. Tant et si bien que l'équidistance, dont le tribunal a eu à cœur d'éviter tout emploi, fût-ce comme point de départ ou de premier pas, qu'il a ignorée de bout en bout, ne trouve dans la sentence qu'un seul et unique emploi : bloquer vers l'ouest, à l'instant même où elle vient de lui être octroyée, la zone économique réduite accordée à la France (par. 69). Récusée lorsqu'elle pourrait bénéficier à la France, la méthode de l'équidistance retrouve les faveurs du tribunal lorsqu'il s'agit de l'opposer à la France; et en définitive, c'est seulement entre les points D et J que la France obtient réellement, à l'ouest, une zone économique de 12 milles en plus de sa mer territoriale.

7. Quatrièmement, et surtout : pourquoi les considérations qui ont inspiré la solution d'une zone économique même étroite venant s'ajouter à la mer territoriale à l'ouest des îles n'ont-elles pas joué à l'est ? Pourquoi entre le point 1 et le point O, qui marque le début du

couloir, la ligne reste-t-elle fixée par la sentence à 12 milles des lignes de base des îles (par. 71, dernière phrase), ne laissant à la France que sa mer territoriale et la privant de toute zone économique ? Pourquoi cette allure déséquilibrée conférée ainsi à la fois à la tête du champignon (gonflée à l'ouest et amaigrie à l'est) et à son pied (puisque la limite occidentale du corridor commence à 24 milles de la côte française et est d'une longueur de 176 milles, alors que sa limite orientale commence à 12 milles de la côte française et est d'une longueur de 188 milles) ? Cela est d'autant plus difficile à comprendre que c'est précisément vers l'est, comme l'avait noté la sentence franco-britannique de 1977[3], que l'espace disponible était le plus grand.

8. Mais c'est le corridor — le pied du champignon — qui se heurte aux objections les plus graves. A l'appui de cette solution la sentence invoque deux explications : la théorie de la projection frontale et le principe de non-empiétement. La première, cependant, est contraire à la philosophie des projections maritimes et est démentie par la pratique des Etats et la jurisprudence. Quant au second, s'il est irréprochable en lui-même, il est mis en œuvre par la sentence d'une manière inacceptable.

* * *

9. Les côtes se projettent frontalement, dans la direction à laquelle elles font face : tel est le principe directeur sur lequel la sentence se fonde pour expliquer le corridor. Selon cette théorie, les côtes se projettent uniquement dans la direction à laquelle elles font face, c'est-à-dire perpendiculairement à la direction générale de la façade maritime, et cette projection s'effectue sur la largeur correspondant à la largeur de la façade maritime. En conséquence, dès lors que, selon le tribunal, l'ouverture côtière méridionale de Saint-Pierre-et-Miquelon a une largeur de 10,5 milles marins, c'est la forme d'un couloir nord-sud d'une largeur de 10,5 milles marins que cette côte engendre.

10. Le tribunal se rallie ainsi à la thèse de la projection frontale soutenue par le Canada. Comme l'indique la sentence (par. 59), le Canada, qui s'était opposé dans l'affaire du *Golfe du Maine* à une théorie du même ordre préconisée par les Etats-Unis, faisait valoir qu'il n'avait pas obtenu gain de cause dans cette affaire et que la Chambre de la Cour avait rejeté la théorie de la projection radiale, défendue devant elle par le Canada, au profit de la théorie de la projection frontale, défendue devant elle par les Etats-Unis. En réalité, la théorie de la projection frontale était étroitement liée, dans la thèse des Etats-Unis, à la distinction qu'ils préconisaient entre les côtes "principales" (américaines) et les côtes "secondaires" (canadiennes) à l'intérieur du golfe du Maine, et c'est sur ce terrain que la revendication américaine a été rejetée par la Chambre[4].

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[3] Par. 200. Les textes anglais et français de la sentence franco-britannique de 1977 sont publiés dans Nations Unies, *Recueil des sentences arbitrales*, vol. XVIII, p. 3 et suiv. pour le texte anglais, p. 130 et suiv. pour le texte français. Il ne sera fait référence ici qu'aux paragraphes.

[4] *C.I.J. Recueil 1984*, p. 270, par. 36 et 37.

Quant à la distinction entre la projection frontale et la projection radiale, la Chambre n'en a pas fait état; il est inexact de dire qu'elle a rejeté la seconde au profit de la première.

11. J'avoue ne pas comprendre comment la majorité du tribunal a pu faire sienne cette étrange théorie. Il est clair que "[l]orsqu'on recourt à une distance constante pour définir la projection en mer de l'Etat côtier, ... la zone maritime de l'Etat côtier ne doit pas se concevoir comme une plate-forme s'avançant devant sa côte, mais comme une vaste ceinture de mer entourant son territoire dans toutes les directions"[5]. Une projection maritime définie par une certaine distance de la côte ne s'effectue pas seulement dans une direction perpendiculaire à la direction générale du littoral et sur la largeur de ce littoral. Elle irradie dans toutes les directions, créant une enveloppe océanique autour de la façade côtière. En un mot, elle est radiale. Telle était déjà, à propos de la mer territoriale, la signification de la *cannon-shot rule :* le canon tire dans toutes les directions, engendrant cette "ceinture des eaux territoriales" dont a parlé la Cour internationale[6]. Telle est aujourd'hui la règle pour la zone des 200 milles[7].

12. La projection frontale est condamnée par la pratique des Etats en ce qui concerne tant la fixation des limites extérieures que la délimitation entre Etats voisins. Les limites extérieures des juridictions maritimes sont couramment définies aujourd'hui par référence à la méthode dite des arcs de cercle, qui consiste, on le sait, à tracer des arcs de cercle d'un rayon donné (12 milles pour la mer territoriale, 200 milles pour la zone économique exclusive ou les zones de pêche) à partir de points de base sur la côte. Par définition même, ces arcs de cercle sont tracés dans toutes les directions, sans que la direction frontale ou perpendiculaire ne bénéficie d'aucun traitement particulier. Tel est le cas, parmi bien d'autres, de la zone de pêche du Canada dans la région disputée, que la législation canadienne définit

> ... par des arcs de cercle tracés autour des points déterminés au moyen des coordonnées géographiques ..., et de façon que chacun de ces arcs ait un rayon de 200 milles marins ...[8]

S'il était de principe que les côtes se projettent exclusivement de manière frontale, sans aucun effet radial, le décret canadien de 1977 serait contraire au droit international. Quant aux accords de délimitation, nombre d'entre eux tracent une ligne qui déborde latéralement, et de manière souvent considérable, les façades maritimes des deux

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[5] Mémoire du Canada, par. 151, *C.I.J. Mémoires, Golfe du Maine*, vol. III, p. 54.

[6] *Pêcheries, C.I.J. Recueil*, p. 129.

[7] Dans le cas des côtes à angle droit comme le sont celles de Saint-Pierre-et-Miquelon la projection perpendiculaire aux façades côtières aboutirait au demeurant à des résultats absurdes car elle laisserait en dehors de la juridiction de l'Etat côtier une large zone située en dehors des deux projections frontales : ceci a été démontré de manière frappante par le Canada dans l'affaire du *Golfe du Maine* (Contre-mémoire du Canada, par. 565, *C.I.J. Mémoires, Golfe du Maine*, vol. III, p. 213, et vol. VIII, figure 70).

[8] Décret sur les zones de pêche du Canada (Zones 4 et 5), *Annexes au mémoire du Canada*, vol. I, p. 394. Sauf indication contraire, toutes les italiques sont ajoutées.

parties. Dans une certaine mesure, l'accord franco-canadien du 27 mars 1972 dément lui-même la projection frontale puisque, entre les points 1 et 2, la ligne délimitant la mer territoriale des deux pays se situe en dehors de toute projection frontale est-ouest ou nord-sud de Saint-Pierre-et-Miquelon.

13. La jurisprudence ne fournit pas davantage le moindre appui à la théorie de la sentence. S'il était exact que les côtes se projettent frontalement, et seulement frontalement, vers le large, ni la projection de la France ni celle du Royaume-Uni n'auraient pu déborder si loin vers l'ouest le point le plus occidental de la côte de chacune des parties. Quant à *Libye/Malte*, s'il est vrai que la délimitation décidée par la Cour est étroitement cantonnée et ne se projette pas en éventail vers l'est et l'ouest, cette solution est expressément justifiée dans l'arrêt par la préoccupation de ne pas mordre sur des zones sur lesquelles l'Italie aurait des prétentions; la projection frontale n'a joué aucun rôle dans cette décision[9]. Loin de rejeter la projection radiale, la Cour a pris soin, tout au contraire, de préciser qu'"[u]ne décision restreinte de la sorte ne signifie pas ... que les prétentions formulées par l'une et l'autre des parties sur des étendues de plateau continental extérieures à la zone soient tenues pour injustifiées"[10].

14. On observera enfin que ni le Canada ni le tribunal lui-même ne sont restés fidèles à la projection frontale dont ils proclament le principe. Le Canada a décrit sa thèse de l'enclave comme tendant à créer une "ceinture" de 12 milles autour des îles françaises, et dans ses conclusions finales il demandait au tribunal de définir le tracé de la délimitation unique "par des segments d'arcs de cercles construits à partir de points situés sur la laisse de basse mer le long des côtes des îles Saint-Pierre-et-Miquelon ... de telle sorte que chaque segment d'arc ait un rayon de 12 milles marins ..." Quant au tribunal, c'est également au principe de la projection radiale qu'il recourt pour définir la ligne de délimitation dans le secteur occidental (par. 69). Pourquoi y aurait-il projection frontale vers le sud, et projection radiale vers l'ouest ? Ceci demeure un mystère.

15. J'ajouterai que, en supposant même exacte la théorie de la projection frontale, un couloir orienté plein sud ne serait justifié que si la côte méridionale des îles françaises courait exactement dans un axe ouest-est. La vérité, bien entendu, est tout autre. Un coup d'œil sur la carte montre que, s'il est plusieurs manières de décrire la côte méridionale des îles et d'en mesurer la longueur, aucune d'elles ne conduit à constater l'existence d'une ligne littorale d'une longueur de 10,5 milles courant exactement d'ouest en est et justifiant un corridor orienté plein sud. La ligne imaginaire joignant le point le plus occidental de l'île de Miquelon au point le plus oriental de l'île de Saint-Pierre, à laquelle se réfère le paragraphe 71 de la sentence pour justifier la largeur du corridor, n'est certainement pas une ligne exactement ouest-est justifiant un

[9] *C.I.J. Recueil 1985*, p. 26, par. 21.
[10] Ibid.

corridor dont l'axe serait exactement nord-sud. Tout ceci, j'ai le regret de devoir le dire, me paraît assez arbitraire.

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16. La sentence invoque un second fondement à l'appui de sa solution, à savoir le principe de non-empiétement. En limitant la zone française à un étroit couloir dont la largeur ne dépasse pas celle de la façade côtière méridionale de Saint-Pierre-et-Miquelon, est-il expliqué, on évite que la projection des îles françaises ne vienne empiéter sur la projection frontale parallèle de segments adjacents de la côte méridionale de Terre-Neuve (par. 70). Si j'ai bien compris, une zone française qui dépasserait la largeur de la côte méridionale de Saint-Pierre-et-Miquelon créerait un effet d'éventail qui aurait pour conséquence d'empiéter sur les projections frontales parallèles (c'est-à-dire elles aussi nord-sud) de la côte adjacente de Terre-Neuve. Or, semble dire le tribunal, le principe de non-empiétement interdit d'amputer la projection de Terre-Neuve et, pour cette raison également, qui vient s'ajouter au principe de projection frontale, le couloir français ne saurait dépasser la largeur de 10,5 milles.

17. Il n'est pas question, bien sûr, de mettre en doute le principe de non-empiétement, qui constitue l'un des piliers du droit de la délimitation maritime. Par ailleurs, comme le reconnaît la sentence (par. 67), toute délimitation comporte nécessairement une amputation et un empiétement mutuels, en ce sens que chacun des Etats doit renoncer à une partie des espaces auxquels il aurait droit si l'autre Etat n'existait pas. Mais il y a plus que cela : pour aboutir à un résultat équitable, il faut que l'amputation et l'empiétement mutuels dont va émerger la frontière maritime soient répartis de manière équilibrée et raisonnable entre les deux Etats et que le sacrifice ne soit pas imposé à un seul d'entre eux. L'exercice de délimitation et l'appréciation de l'équité du résultat ne doivent pas être abordés du seul point de vue de l'un des Etats, de telle sorte que serait présumée inéquitable toute ligne qui ne sauvegarderait pas pour l'essentiel l'intégrité des projections de l'un des Etats, privilégiant ainsi ces dernières sur celles de l'autre.

18. Dans ses mémoires comme dans ses plaidoiries, le Canada a envisagé le principe de non-empiétement sous un angle essentiellement unilatéral, du point de vue du seul Canada : ce qu'il faut éviter, a-t-il soutenu en substance, c'est que l'espace maritime que le tribunal va accorder à la France n'ampute les projections des côtes canadiennes de Terre-Neuve et de l'île du Cap-Breton. Pour appuyer cette thèse le Canada a présenté une théorie du poids inégal des côtes du Canada et de Saint-Pierre-et-Miquelon assise sur des facteurs aussi divers que la superficie différente des territoires en cause, la disparité des longueurs côtières, l'insularité de Saint-Pierre-et-Miquelon, leur statut d'îles dépendantes, etc. Devant les projections plus fortes des côtes canadiennes, a soutenu le Canada, les projections des côtes françaises ne peuvent recevoir qu'un effet réduit. C'est cette approche unilatérale qui sous-tendait la thèse canadienne selon laquelle, s'il y a dans la région deux

Etats souverains, il n'y a qu'un seul Etat côtier. C'est cette approche aussi qui a été à la racine du thème canadien que tout espace que le tribunal attribuerait à la France serait fatalement "découpé" dans l'espace canadien, "soustrait" à l'espace canadien — comme si les projections canadiennes étaient une donnée préexistante et intangible que toute zone reconnue à la France ne pourrait qu'amputer inéquitablement.

19. La mission du tribunal n'était pas de définir la zone française en partant du présupposé axiomatique que toute cette région est canadienne par essence ou par nature. La zone française ne devait pas être déterminée par soustraction de la zone canadienne. Le tribunal ne devait pas raisonner comme si sa mission était de définir ce qui devait être concédé à la France. Ce n'est pas cela que le compromis lui demandait de faire, mais de "procéder à la délimitation . . . des espaces maritimes relevant de la France et de ceux relevant du Canada". Pour le tribunal, la délimitation devait constituer une opération bipolaire. Sans nul doute la sentence rejette-t-elle catégoriquement la thèse canadienne de la force de projection relative et différenciée des côtes du Canada et de Saint-Pierre-et-Miquelon (par. 45), mais dans le second secteur comme dans le premier elle fait tout pour minimiser les projections françaises de manière qu'elles empiètent le moins possible sur les projections canadiennes. Que, réciproquement, les projections canadiennes n'auraient pas dû amputer inéquitablement les projections françaises est une idée qui ne paraît pas s'être imposée avec la même force. D'une certaine manière, le tribunal n'a pas su échapper au piège de l'unilatéralisme.

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20. Une fois écartées les justifications invoquées par la sentence, que ce soit pour le corridor ou pour son chapeau asymétrique, je serais tenté de paraphraser ce que la Cour a dit dans *Libye/Malte* de la revendication libyenne : "il ne reste rien d'autre" dans la solution adoptée "qui puisse fournir un principe indépendant et une méthode de tracé de la ligne, à moins de considérer comme telle la mention des longueurs de côtes"[11]. Toutefois, même si certains pourront avoir l'impression que c'est ainsi que la majorité du tribunal a abordé le problème, le fait est — et cela seul importe sur le plan juridique — que ce n'est pas sur la proportionnalité entre les longueurs côtières et les superficies maritimes que la sentence fait reposer la solution.

21. La jurisprudence antérieure aurait à vrai dire rendu difficile une telle approche. Une délimitation équitable "ne consiste pas . . . en une simple attribution à (des) Etats de zones . . . proportionnelles à la longueur de leurs lignes côtières", déclarait la sentence franco-britannique de 1977[12]. "Une délimitation maritime ne saurait certainement pas être établie en procédant directement à une division de la zone en con-

[11] *C.I.J. Recueil 1985*, p. 45, par. 58.
[12] Par. 101.

testation, proportionnellement à l'extension respective des côtes des parties de l'aire concernée", affirmait *Golfe du Maine*[13]. Plus récemment, dans *Libye/Malte*, la Cour, après un "examen approfondi"[14] du problème, confirmait son opposition radicale à une proportionnalité conçue comme un principe équitable appelé à dicter directement la délimitation : si la proportionnalité devait constituer la *ratio decidendi*, "on voit mal, déclarait-elle, quel rôle toute autre considération pourrait encore jouer"; aussi la Cour avait-elle refusé de "retenir une proposition à la fois si neuve et si radicale" qui "ne trouve aucun appui dans la pratique des Etats ... non plus que dans la jurisprudence"[15]. La cause était donc entendue : la géographie côtière, qui commande la délimitation, ne saurait être mutilée au point de se voir réduire au seul aspect de la longueur des ouvertures côtières mesurée au cordeau; le respect de la géographie ne se ramène pas à l'équité arithmétique des ratios de longueurs côtières et de superficies; et la poursuite d'un résultat équitable ne consiste pas à attribuer aux parties des espaces maritimes dans une proportion à peu près équivalente à celle de la longueur de leurs côtes pertinentes. Il faut dire que le comble du paradoxe eût été atteint si la jurisprudence n'avait quitté les certitudes rassurantes, mais trop automatiques à ses yeux, de l'équidistance que pour tomber dans l'automatisme aveugle d'une proportionnalité assise, on le verra, sur des données largement aléatoires[16] et dont les séductions trompeuses ne peuvent conduire qu'à un simulacre d'équité. On ne saurait qu'approuver le tribunal de ne pas avoir voulu faire sortir la sentence du cadre conceptuel tracé par une jurisprudence unanime (par. 63).

22. Tout au plus la jurisprudence antérieure autorisait-elle le tribunal à tenir compte — "sans pour autant la quantifier" — d'une forte disparité entre les longueurs côtières en tant que circonstance pertinente parmi d'autres et, surtout, une fois défini un tracé de délimitation à la lumière de toutes les circonstances pertinentes, à procéder à un test de proportionnalité *a posteriori* de manière à s'assurer que ce tracé n'aboutit pas à une disproportion déraisonnable entre superficies et longueurs côtières[17]. Si le tribunal n'a guère insisté sur le premier de ces deux aspects (par. 45), il a, en revanche, procédé avec soin au contrôle de proportionnalité *a posteriori* (par. 92-93).

23. On peut toutefois aller plus loin et déplorer que le tribunal n'ait pas renoncé au test de proportionnalité sous sa forme chif-

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[13] *C.I.J. Recueil 1984*, p. 323, par. 185.

[14] *C.I.J. Recueil 1985*, par. 43 et s., par. 55 et s. Cf. opinion conjointe Ruda, Bedjaoui et Jiménez de Aréchaga, *op. cit.*, p. 82 et s.

[15] *Op. cit.*, p. 45-46, par. 58.

[16] La Cour l'a dit clairement : alors qu'"une série déterminée de points de base ne peut engendrer qu'une ligne d'équidistance, et une seule", il arrive fréquemment que "la marge de détermination des côtes pertinentes et des zones pertinentes (soit) si large que pratiquement n'importe quelle variance pourrait être obtenue" dans une recherche de proportionnalité (*op. cit.*, p. 24, par. 19, et p. 53, par. 74).

[17] *Op. cit.*, p. 49, par. 66. La Cour paraît à vrai dire plus restrictive à cet égard que la sentence, puisqu'elle restreint la prise en considération des longueurs côtières en tant que circonstance pertinente à l'emploi d'une ligne médiane alors que le test de proportionnalité *ex post* peut jouer, dit-elle, à propos de n'importe quelle méthode (ibid.).

frée, auquel rien ne le contraignait. Dans *Golfe du Maine*, on peut le rappeler, la Chambre n'avait procédé à aucune confrontation *a posteriori* des rapports de superficies et de longueurs côtières. Dans l'arrêt *Libye/Malte* — sur l'autorité duquel la sentence s'appuie —, la Cour avait certes estimé qu'aucune raison de principe n'empêche d'"employer le test de proportionnalité à peu près de la même manière dont on l'a fait en l'affaire *Tunisie/Libye*, et qui consiste à déterminer les 'côtes pertinentes' et les 'zones pertinentes', à calculer les rapports arithmétiques entre les longueurs de côtes et les superficies attribuées et finalement à comparer ces rapports, afin de s'assurer de l'équité d'une délimitation . . .", mais elle avait pris soin d'ajouter que "certaines difficultés pratiques peuvent fort bien rendre le test inapproprié sous cette forme". Ces "difficultés" lui ont paru "particulièrement manifestes" dans le cas "où . . . le contexte géographique rend la marge de détermination des côtes pertinentes et des zones pertinentes si large que pratiquement n'importe quelle variante pourrait être retenue, ce qui donnerait des résultats extrêmement divers". C'est pourquoi la Cour, après avoir rappelé une nouvelle fois qu'il ne serait pas "conforme aux principes de l'opération de délimitation d'essayer de parvenir à un rapport arithmétique préétabli entre les côtes pertinentes et les surfaces . . . qu'elles engendrent", s'était contentée de "se faire une idée approximative de l'équité du résultat sans toutefois essayer de l'exprimer en chiffres" et s'était bornée à constater "qu'il n'y a certainement pas de disproportion évidente" entre les surfaces attribuées "au point qu'on pourrait dire que les exigences du critère de proportionnalité en tant qu'aspect de l'équité ne sont pas satisfaites"[18]. En termes à peine voilés, la Cour exprimait sa réticence à l'égard d'un test de proportionnalité arithmétique, reposant sur la détermination et la mesure de côtes pertinentes et d'une zone pertinente.

24. La présente affaire illustrait admirablement les incertitudes et les risques du test de proportionnalité sous sa forme chiffrée. Quels sont les segments des côtes de chaque partie qui doivent être retenus comme pertinents ? Comment faut-il en mesurer la longueur : en en suivant la moindre sinuosité, en calculant le pourtour des baies les plus profondes et des promontoires les plus longs, ou bien en se fondant sur une direction générale plus ou moins simplifiée et, par là même, nécessairement arbitraire ? Et comment définir les contours, donc la superficie, de la

[18] *Op. cit.*, p. 53-55, par. 74 et 75. La Cour confirmait ainsi l'attitude prudente du tribunal franco-britannique, qui avait énoncé que la vérification de l'absence de disproportion n'exigeait pas des *nice calculations* (par. 27 et 250). Cette prudence a été approuvée par l'opinion conjointe dans *Libye/Malte*, qui refuse de concevoir la proportionnalité comme "une opération mathématique rigoureuse" et invite "à ne pas donner à ce principe une expression aveugle, sous la forme d'un rapport arithmétique automatiquement appliqué" (*op. cit.*, p. 88, par. 31). La même prudence est observée dans la sentence arbitrale *Guinée/Guinée-Bissau* de 1985, qui déclare que "la règle de la proportionnalité n'est pas une règle mécanique reposant sur les seuls chiffres traduisant la longueur des côtes" (par. 120). Le texte français de la sentence *Guinée/Guinée-Bissau* est reproduit dans *Revue générale de droit international public*, vol. 89, 1985, p. 484 et suiv. Une traduction anglaise non officielle est publiée dans *International Legal Materials*, vol. 25, 1986, p. 251 et suiv., et dans *International Law Reports*, vol. 77, p. 636 et suiv. Il ne sera fait référence ici qu'aux paragraphes.

zone pertinente ? A ces questions, qui sont au cœur de tout contrôle arithmétique de proportionnalité, fût-ce au titre de simple test *a posteriori*, il n'existe pas de réponse scientifique, ou même juridique, clairement définie ou objectivement valable. Un plaideur peut toujours espérer améliorer son cas en allongeant ses propres segments côtiers pertinents, en raccourcissant ceux de l'autre partie ou en jouant sur l'étendue de la zone pertinente. Rien de plus aléatoire, en définitive, que les modèles de proportionnalité élaborés en abondance par les parties, dans notre affaire comme dans bien d'autres. L'expérience révèle que ces modèles sont d'une flexibilité telle que l'on peut en concevoir une variété presque infinie et qu'il est possible, par une démarche d'apparence faussement scientifique, d'en tirer à peu près ce que l'on veut. Il en va de la détermination et de la mesure des côtes pertinentes et de la zone pertinente comme de l'amour et des auberges espagnoles : chacun y trouve ce qu'il y apporte. Dans notre affaire, les parties ont exprimé des vues largement divergentes au sujet de l'identification et de la mesure des côtes pertinentes[19] et de la zone pertinente, et chacune d'elles a présenté plusieurs chiffres, dont certains, pour la zone pertinente, à titre d'hypothèse (par. 27 et suiv. et 93). Les chiffres retenus par la sentence aux paragraphes 33 et 93 pour les longueurs côtières, la superficie de la zone pertinente et leurs ratios respectifs[20] ne sont ni plus ni moins convaincants que ceux qui ont été avancés par les parties.

25. On peut au demeurant se demander s'il existe une différence réelle entre un test de proportionnalité chiffré comme celui auquel procède la sentence et la proportionnalité comme critère direct de délimitation. Que se passerait-il au cas où le test de proportionnalité conduirait à constater une disproportion déraisonnable entre les ratios des longueurs côtières et ceux des superficies ? Le juge ou l'arbitre serait-il contraint alors, en vue de parvenir à un résultat plus proportionné, de modifier la ligne à laquelle il déclare être parvenu par d'autres moyens ? Répondre par la négative serait priver le test de proportionnalité de toute signification. Répondre par l'affirmative reviendrait à faire de la proportionnalité le principe directeur de la délimitation. L'hypothèse d'un test défavorable, dira-t-on, est peu plausible et ne s'est jamais présentée : mais n'est-ce-pas précisément parce que le choix des données sur lesquelles le test arithmétique repose est effectué, dans la réalité des choses, de manière à conforter un résultat préétabli ?

26. Je regrette en conséquence, je le répète, que le tribunal ait cru devoir procéder à un test chiffré de proportionnalité sur le modèle — unique et contesté — de *Tunisie/Libye*. Sous cette réserve, cependant, la sentence est, dans sa rédaction, d'une orthodoxie sans faille en

[19] Comme l'indique la sentence (par. 33), le Canada se prévalait d'un ratio de longueurs côtières de 21,4:1. Quant à la France (dont la sentence omet assez curieusement de mentionner la position), elle faisait état d'un ratio de longueurs côtières de 6,5:1. On mesure l'ampleur de la marge d'indétermination.

[20] 15.3:1 pour le ratio des longueurs côtières; 16,4:1 pour celui des superficies attribuées.

ce qui concerne la proportionnalité, puisqu'elle ne fait pas de la proportionnalité le principe opératoire de la délimitation et que la ligne tracée ne se veut pas une ligne de proportionnalité. On ne saurait que s'en féliciter; mais du même coup une explication possible, encore qu'éminemment critiquable, de la solution adoptée s'évanouit.

27. Il reste alors, pour tenter d'expliquer l'inexplicable, une dernière possibilité : la ligne a paru équitable à la majorité du tribunal, et cela a suffi à soi seul, à ses yeux, pour satisfaire en droit à la norme fondamentale du résultat équitable.

28. Il est à peine besoin de rappeler que, mettant un terme aux aléas de l'équité autonome, tirée par le juge des faits singuliers de chaque espèce et subjectivement appréciée par lui cas par cas — le "principe du non-principe"[21] ou l'équité selon "l'œil du juge"[22] —, l'arrêt *Libye/Malte* a procédé à la juridisation des principes équitables, qui revêtent à présent un "caractère normatif" et doivent pour cela être marqués par "la cohérence et une certaine prévisibilité"; dorénavant, "bien qu'elle s'attache plus particulièrement aux circonstances d'une affaire donnée", l'équité "envisage aussi, au-delà de cette affaire, des principes d'une application plus générale"[23]. Comme l'écrit le juge Bedjaoui, la Cour a conféré ainsi à l'équité, donc aux principes équitables, "une dimension normative, sécuritaire, prévisible et générale dans son application"[24]; par là même les principes équitables cessent de constituer "une forme d'équité autonome, indépendante de la règle de droit et subsidiaire à celle-ci", pour devenir "une équité correctrice intervenant de manière endogène pour éviter que la règle de droit n'aboutisse à un résultat inéquitable dans son application à un cas concret"[25]. Mettant fin au jeu de hasard que menaçait de devenir la délimitation judiciaire ou arbitrale, la Cour retrouvait ainsi en 1985 l'approche plus rigoureuse de l'arrêt de 1969 et de l'arbitrage de 1977. Même si la sentence déclare prendre appui sur le (pseudo) principe équitable de la projection et si elle se réfère (en le dénaturant) au principe équitable de non-empiétement, elle ignore en réalité le "tournant jurisprudentiel de 1985" et le "redressement"[26] opéré par *Libye/Malte* et retourne à l'équité autonome qui tient lieu de droit, que l'on espérait définitivement abandonnée.

29. La régression n'est pas moins manifeste en ce qui concerne les méthodes. Alors que la sentence franco-britannique déclarait, dans un *dictum* devenu célèbre, que le juge n'a pas "carte blanche pour recourir à n'importe quelle méthode de son choix pour effectuer une délimitation équitable"[27], on se défend mal de l'impression que, dans son souci de parvenir à une solution qui lui permette de respecter une

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[21] Oda, op. diss. *Tunisie/Libye, C.I.J. Recueil 1982*, p. 255, par. 155.
[22] Gros, op. diss. *Golfe du Maine, C.I.J. Recueil 1984*, p. 388, par. 47.
[23] *C.I.J. Recueil 1985*, p. 39, par. 45.
[24] Bedjaoui, "L''énigme' des 'principes équitables' dans le droit de la délimitation maritime", *Revista Española de Derecho Internacional*, vol. XLII (1990), p. 367 et suiv., p. 378.
[25] *Op. cit.*, p. 384.
[26] Bedjaoui, *op. cit.*, p. 369 et 378.
[27] Par. 245.

proportionnalité chiffrée entre des longueurs côtières et des superficies tout en déniant à la proportionnalité le caractère d'un principe équitable de délimitation, le tribunal s'est en fait reconnu carte blanche pour adopter et combiner les méthodes qui lui ont paru conduire à un résultat à ses yeux équitable. Et voici le résultat : une délimitation aux formes étranges, qui accorde à la France une zone économique dont l'étendue et la configuration ne paraissent guère adaptées à une exploitation cohérente. Est-ce là une solution raisonnable et équitable ? Equité, que d'injustices on commet en ton nom !

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30. Il eût pourtant été simple d'éviter le retour à l'aléatoire absolu. Mettant un frein au vagabondage des principes équitables et des circonstances pertinentes, la jurisprudence paraissait enfin avoir dégagé un fil directeur. Toutes les circonstances pertinentes semblaient devoir tendre à converger vers une seule, et tous les principes équitables paraissaient vouloir se concentrer en un seul : une distance raisonnable de la ligne de délimitation par rapport à chacune des côtes. Tout se passait comme si les juges tendaient à apprécier l'équité d'une ligne, qu'elle soit d'équidistance ou non, par rapport à un critère central : la ligne est-elle assez éloignée de chaque côté pour assurer à chacun des Etats un territoire maritime suffisant ? N'est-elle pas trop proche de la côte de l'un des Etats au point de menacer ses intérêts de souveraineté ? L'équité dans le droit de la délimitation maritime tendait à devenir d'essence spatiale. On retrouvait ainsi l'idée géopolitique, confuse certes mais d'une grande puissance motrice, que les juridictions maritimes, tout comme la souveraineté terrestre, s'expriment sous la forme d'un espace. Le territoire, qu'il soit maritime ou terrestre, est un élément consubstantiel à la souveraineté. Le vocable même de "territoire maritime", employé dans *Guinée/Guinée-Bissau*, est significatif à cet égard, tout comme l'est celui de "frontière maritime" utilisé de plus en plus fréquemment dans les accords de délimitation.

31. Dès l'origine, à vrai dire, les concepts d'empiétement et d'amputation étaient rattachés à l'idée qu'une certaine épaisseur de territoire est nécessaire à chaque Etat côtier, positivement afin de lui assurer une maîtrise des ressources de la mer et de garantir sa sécurité et négativement afin d'interdire aux Etats tiers de venir explorer, exploiter, forer ou pêcher à une trop grande proximité de son rivage. Cette conception, qui est à la source de l'extension contemporaine des juridictions nationales sur la mer, a été mise en relief dès 1982 dans une opinion de *Tunisie/ Libye*, qui insistait sur l'importance du facteur de distance dans le principe de non-empiétement et évoquait le "rejet presque immédiat et instinctif, par tous les Etats souverains, de l'idée que des Etats étrangers ... puissent se présenter devant leurs côtes, ... à faible distance des ports et des défenses côtières, pour exploiter le fond des mers et édifier à cette fin des installations fixes". En particulier, soulignait cette opinion, "l'empiétement est tout spécialement à éviter quand on envi-

sage une limite qui rapprocherait à l'excès un Etat des principaux ports de l'autre"[28].

32. Depuis lors, cette conception politico-économique de l'amputation et du non-empiétement avait fait du chemin. Dans *Golfe du Maine,* les Etats-Unis avaient élevé des objections contre une frontière maritime qui passerait trop près de leur littoral et interposerait des espaces maritimes canadiens entre leur côte, d'une part, la haute mer et l'Europe, de l'autre[29]. Dans *Libye/Malte*, l'une des causes profondes du rejet par la Cour de la ligne revendiquée par la Libye se trouvait probablement dans l'idée qu'une frontière maritime passant sous les fenêtres de Malte ne pouvait pas être regardée comme équitable. La Cour n'a pas manqué de relever que "la limite qui résultera du présent arrêt . . . ne sera pas proche de la côte de l'une ou l'autre partie au point que les questions de sécurité entrent particulièrement en ligne de compte en l'espèce"[30]. Dans le droit fil de cette évolution, la sentence *Guinée/ Guinée-Bissau* a fait de ces considérations l'essence même du résultat équitable à atteindre :

> Pour faire reposer une délimitation sur une base équitable et objective, il faut autant que possible chercher à assurer à chaque Etat le *contrôle des territoires maritimes* situés en face de ses côtes et dans leur voisinage . . . [L']objectif premier [du tribunal] a été d'éviter que, pour une raison ou pour une autre, une des parties qui voie s'exercer en face de ses côtes et dans leur voisinage immédiat les droits qui pourraient porter atteinte à son droit au développement ou compromettre sa sécurité[31].

33. J'aurais souhaité que de cette évolution jurisprudentielle le tribunal tirât la leçon, apportant ainsi une grande simplification au droit de la délimitation maritime. J'aurais aimé qu'il admît que les multiples aspects de l'équité selon le droit tendent à se résumer dans une approche spatiale mêlant géographie, intérêts économiques, préoccupations de souveraineté, considérations politiques ou même géopolitiques au sens le plus large. Outre ses mérites propres, cette approche aurait permis au tribunal de faire progresser l'épineux problème du caractère juridiquement pertinent, ou non, des facteurs économiques ou socio-économiques, d'une part, des considérations politiques de sécurité, navigation, etc., d'autre part.

34. Sans doute est-il acquis que le tracé d'une délimitation maritime ne peut être dicté par le souci de partager les ressources, et la sentence adhère à ce principe (par. 83). Toute autre solution conduirait à effectuer la délimitation d'une grave précarité : la connaissance des ressources peut évoluer, et telle ressource aujourd'hui précieuse peut cesser d'être économiquement valable demain, et *vice versa*. Bref, la frontière est là où elle est, et les ressources là où elles sont. Il n'en demeure pas moins que l'on ne saurait, sous peine de verser dans l'artifice et la

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[28] Jiménez de Aréchaga, op. ind. *Tunisie/Libye, C.I.J. Recueil 1982*, p. 119, par. 69; p. 72 et 75.
[29] *C.I.J. Mémoires, Golfe du Maine*, vol. VII, p. 266.
[30] *C.I.J. Recueil 1985*, p. 42, par. 51.
[31] Par. 92 et 124.

fiction, éliminer complètement les considérations économiques et socio-économiques de la balance des équités; cela serait d'autant plus paradoxal que l'exploration et l'exploitation des ressources sont à la racine des concepts de plateau continental, de zone de pêche et de zone économique exclusive. Il est évident, par exemple, qu'en 1969 la Cour a eu à l'esprit, sans le dire, les ressources en hydrocarbures que l'on pensait exister au milieu de la mer du Nord. Il est évident également que dans *Golfe du Maine* les ressources halieutiques ont joué un rôle déterminant — et d'ailleurs partiellement avoué : ne lit-on pas dans l'arrêt que le banc de Georges était "le véritable objet du différend . . ., l'enjeu principal du procès, et ceci en ce qui concerne les ressources potentielles du sous-sol, et surtout les pêcheries d'une importance économique dominante"[32] ? On ne peut se défendre de l'impression que les facteurs socio-économiques identifiés longuement aux paragraphes 238 à 241 de l'arrêt de 1984 au titre de la vérification du résultat ont été, très précisément, les facteurs qui ont, sans que cela ait été dit, inspiré directement le tracé de la frontière maritime. Dans notre affaire, les parties n'ont pas caché que c'étaient les ressources halieutiques du banc de Saint-Pierre qui constituaient l'enjeu principal du procès. Le problème des pêcheries a été débattu longuement, et nul ne peut douter que c'est au regard de ces problèmes que la sentence va être accueillie et évaluée par les gouvernements et par les milieux politiques et socio-professionnels intéressés. En se bornant à une vérification après coup de l'absence de "répercussions catastrophiques" de la délimitation décidée sur d'autres bases, la sentence (par. 83 et 84), tout comme l'avait fait *Golfe du Maine*, se cache quelque peu derrière son ombre.

35. Plus importante toutefois que la composante économique de l'équité spatiale est sa composante politique, avec ses considérations de sécurité, de navigation, d'environnement, etc. Le Canada a tout particulièrement insisté sur ses "intérêts vitaux" dans la région, et notamment sur la nécessité de conserver le contrôle des voies de navigation assurant l'accès au golfe du Saint-Laurent et au cœur industriel du pays. De telles considérations, que la sentence franco-britannique n'acceptait de prendre en compte que pour "étayer et renforcer"[33] les conclusions auxquelles elle était parvenue par d'autres voies, se sont vu accorder dans la jurisprudence récente (notamment dans *Guinée/Guinée-Bissau* et *Libye/Malte*) une importance nettement plus grande. Dans la perspective d'une équité essentiellement spatiale ces considérations occupent évidemment une place importante. Pour ce qui est de la France, même si le banc de Saint-Pierre n'était le siège d'aucune ressource connue, halieutique ou autre, même si l'accord de 1972 mettait la France à l'abri de toute répercussion fâcheuse d'une délimitation défavorable, la France aurait quand même droit à un plateau continental et à une zone économique. Combien d'accords de délimitation maritime n'ont-ils pas été conclus dans des régions où aucun intérêt économique immédiat ou identifiable n'était en jeu ?

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[32] *C.I.J. Recueil 1984*, p. 340, par. 232.
[33] Par. 188.

36. Il ne faut pas se dissimuler que l'intégration des facteurs économiques et politiques dans la balance des équités risque de rapprocher dangereusement la décision judiciaire de la conciliation. Entre la balance des équités et l'*ex aequo et bono*, la ligne de crête est assurément étroite. Mais il faut le dire franchement : c'est là le prix à payer pour l'abandon de l'équité géographique concrétisée par la méthode simple et neutre de l'équidistance au profit d'une équité largement étendue. Si la jurisprudence s'en était tenue à l'équidistance, quitte à l'ajuster dans certaines situations géographiques vraiment exceptionnelles — ce qui était la conception à la base de l'article 6 dans l'esprit de la Commission du droit international —, le problème des facteurs non géographiques ne se serait pas posé. Dès lors que la jurisprudence choisissait de quitter le terrain solide de la géographie pour tenir compte de toutes les circonstances pertinentes, "géographiques *et autres*" — bref, de s'exposer aux grands vents des principes équitables et du résultat équitable —, elle ne pouvait plus évacuer complètement de l'examen judiciaire les considérations économiques et politiques. De même que le droit international impose à chaque Etat de tenir compte des intérêts de l'autre, de même que toute négociation de bonne foi implique que chacun prenne en considération le point de vue et les intérêts de l'autre, de même en matière de délimitation maritime la recherche du résultat équitable impose-t-elle au juge et à l'arbitre de mettre en balance les intérêts des deux parties. On a parfois critiqué la tendance de la Cour et des tribunaux arbitraux à partager la zone disputée, ou même à *split the difference* entre les lignes extrêmes revendiquées par les parties[34]. Mais il faut bien se rendre compte qu'accommoder les intérêts des parties est une exigence inhérente à la norme fondamentale du résultat équitable; et l'on peut même se demander si l'attribution à chacun d'une "part juste et équitable de l'espace en cause"[35] — à laquelle les tribunaux jurent depuis 1969 ne pas vouloir procéder — n'était pas incluse dans la norme fondamentale comme un germe dans l'œuf. De la balance des équités à la balance des intérêts, le glissement était inévitable. En substituant le jugement de valeur de la balance des équités à l'automatisme tempéré de l'équidistance ajustée, le droit international s'est engagé dans une aventure dont il doit accepter les difficultés et assumer les risques.

37. Le tribunal avait le choix entre la logique de l'équité géographique et la logique de l'équité tout court. C'est à la première que la sentence déclare se référer, puisqu'elle énonce que "[l]es considérations

[34] Les auteurs de l'opinion conjointe de *Libye/Malte* ont estimé que l'équité dans cette affaire aurait dû conduire la Cour à une "ligne divisant par parts égales la zone contestée, c'est-à-dire la zone revendiquée par l'une et l'autre Parties et située entre la ligne maltaise de stricte équidistance, au sud, et la ligne de proportionnalité rigoureuse avancée par la Libye, au nord". Et ils ont ajouté : "Peut-être la Cour, en divisant en parts égales la zone en litige, aurait-elle donné l'impression d'avoir en quelque sorte transigé entre les revendications des deux Parties . . . Il ne fait . . . pas de doute que la Cour n'a pas le pouvoir de transiger, alors qu'on attend d'elle qu'elle s'en tienne à dire le droit. Mais il est non moins évident qu'elle ne saurait renoncer à une solution de partage égal qu'imposent des circonstances spéciales, car alors elle renoncerait précisément à dire le droit" (*C.I.J. Recueil 1985*, p. 90, par. 35 à 37).

[35] *Mer du Nord, C.I.J. Recueil 1969*, p. 21, par. 17.

géographiques sont au cœur du processus de délimitation" (par. 24) et qu'elle affirme recourir uniquement à des critères géographiques, à l'exclusion de toute considération économique ou autre (par. 83). Mais en réalité c'est à une géographie réduite à une projection frontale contestable, à un principe de non-empiétement dénaturé et à une proportionnalité qui n'ose pas dire son nom qu'il est fait appel, alors que se trouve radicalement écarté tout recours à la méthode géographique par excellence, celle de l'équidistance. Pour ma part, j'aurais souhaité que l'on prît comme point de départ une ligne d'équidistance que l'on aurait ensuite pu ajuster, conformément au principe énoncé par la sentence franco-britannique, trop souvent oublié par ceux-là mêmes qui s'appuient sur l'autorité de cette dernière, selon lequel

> ... il est conforme ... aux règles juridiques applicables ... de rechercher la solution dans une méthode modifiant le principe de l'équidistance ou y apportant une variante plutôt que de recourir à un critère de délimitation tout à fait différent[36].

Faisant taire mes convictions juridiques, j'aurais cependant accepté de souscrire à une solution ne faisant pas appel à la méthode de l'équidistance, même au titre de premier pas, si du moins le tribunal, choisissant la logique de l'équité largement entendue, avait tracé la frontière maritime de manière que chaque partie puisse être rassurée sur sa sécurité (au sens géopolitique le plus large du terme) et sur l'avenir économique des régions concernées. Dans les circonstances de l'affaire, l'attribution de la quasi-totalité du banc de Saint-Pierre à la France m'aurait semblé tout aussi inéquitable, donc contraire au droit, que me semble inéquitable l'attribution de la quasi-totalité du banc au Canada. La prise en compte des intérêts du Canada en matière de contrôle des voies de navigation vers le golfe du Saint-Laurent me paraissait indispensable, tout comme la reconnaissance à la France, indépendamment même de toute considération économique, d'un territoire maritime digne de ce nom. Pour répondre à ces diverses exigences, plusieurs tracés étaient concevables. Une opinion dissidente n'est pas le lieu approprié pour les détailler.

II

38. Je déplore d'autant plus que les considérations qui précèdent m'aient amené à voter contre la sentence, alors que sur bien des points j'approuve entièrement les positions adoptées par le tribunal.

39. Je me félicite, par exemple, que la sentence ait écarté la conception, soutenue par la France, d'une délimitation certes unique, mais qui aurait pu reposer sur la prise en considération distincte des équités du fond marin et de celles de la colonne d'eau, au profit de la conception, défendue par le Canada, d'une opération intégrée, globale et synthétique. En adoptant cette position, le tribunal n'a probablement pas entendu affirmer que toute délimitation maritime doive nécessairement être unique, en ce sens qu'une seule et même ligne devrait obligatoirement séparer le plateau continental et la zone économique exclusive (ou

[36] Par. 249.

la zone de pêche) de deux pays dont les côtes sont adjacentes ou se font face; pas davantage n'a-t-il voulu décider que tout accord conclu entre deux Etats pour la délimitation du plateau continental doive nécessairement s'étendre à la zone économique exclusive. Comme dans *Golfe du Maine*[37], il s'est contenté de noter que les parties lui ont demandé une délimitation unique et polyvalente, que "le droit international ne comporte certes pas de règles qui s'y opposent" et qu'il "n'existe pas d'impossibilité matérielle" qui empêche le tribunal d'accomplir l'opération qui lui est demandée (par. 37). La sentence s'inscrit ainsi dans l'évolution de la pratique des Etats et de la pratique judiciaire vers une frontière maritime unique couvrant l'ensemble du faisceau des droits et juridictions maritimes que le droit international reconnaît aux Etats côtiers.

40. C'est à juste titre aussi, à mon sens, que le tribunal a rejeté la thèse française qui lui demandait d'appliquer à la délimitation unique englobant la colonne d'eau, en tant que disposition liant les parties à titre conventionnel, l'article 6 de la convention de Genève qui régit seulement la délimitation du plateau continental (par. 39 à 41).

41. Je suis d'accord aussi avec le rejet par le tribunal de toute considération tirée de la configuration physique du plateau continental (par. 46 et 47). Le Canada soutenait que les îles françaises sont assises sur le plateau continental canadien, dont elles constituent une simple protubérance, et qu'en conséquence la totalité de la zone disputée forme le prolongement naturel, ou "le plus naturel", de la côte canadienne. Non seulement une telle considération ne pouvait-elle être d'aucun poids au regard d'une délimitation englobant la colonne d'eau, mais, surtout, elle a cessé d'avoir toute pertinence dès lors que, même pour le plateau continental, la Cour a abandonné en deçà de 200 milles le concept de prolongement naturel physique au profit de celui de distance et décidé que toute référence à des facteurs géopolitiques ou géophysiques aux fins d'une délimitation était désormais exclue[38].

42. J'approuve également le tribunal de ne pas avoir procédé à la délimitation du plateau continental élargi jusqu'au rebord externe de la marge continentale. Le tribunal me semble toutefois être allé un peu loin en paraissant, sinon considérer la convention de 1982 comme un instrument conventionnel liant le Canada et la France, du moins regarder les dispositions de l'article 76 comme ayant toutes, jusque dans le moindre détail technique, valeur coutumière (par. 75 et suiv.). Je ne suis pas convaincu non plus par l'idée sur laquelle le tribunal fonde sa décision, à savoir que le plateau continental élargi devrait donner lieu à une délimitation entre le Canada et la France, d'une part, et, d'autre part, la communauté internationale, partie non présente à l'instance et que devrait représenter la Commission des limites du plateau continental — organe qui n'existe pas encore (par. 78 et 79). La convention de 1982 n'est pas en vigueur, et la valeur coutumière de certaines des dispositions de

[37] *Recueil 1984*, p. 267, par. 27.
[38] *Libye/Malte, C.I.J. Recueil 1985*, p. 35 et 36, par. 39 et 40.

l'article 76 — en particulier des dispositions de caractère technique des paragraphes 4 à 9 — est douteuse. En tout état de cause, comme le relève la sentence (par. 81), les données de fait des fonds marins dans cette région ne sont pas suffisamment établies pour permettre l'application des dispositions de l'article 76, à supposer même que ces dispositions aient toutes valeur de droit positif. Quoi qu'il en soit, le refus du tribunal d'étendre la délimitation au plateau continental élargi me paraît amplement justifié par la constatation que, en l'état actuel du droit international et des données de fait portées à sa connaissance, le tribunal ne pouvait tenir pour acquis que les fonds marins au-delà de 200 milles des côtes canadiennes et françaises font partie des "espaces maritimes relevant" du Canada et de la France que le compromis lui demandait de délimiter. La décision du tribunal ne préjuge évidemment pas — la sentence le déclare expressément (par. 80) — les titres de l'une ou l'autre partie à un plateau continental élargi. Il appartiendra aux parties elles-mêmes de décider si, et sous quelle forme, elles entendent procéder à une délimitation au-delà des points extrêmes M et N de la délimitation décidée par la sentence.

43. Plus important me paraît l'apport de la sentence à l'élaboration et au progrès du droit de la délimitation maritime sur deux points jusqu'ici quelque peu controversés ou ambigus.

44. La position prise par le tribunal sur certains aspects fondamentaux de la théorie des projections maritimes me semble devoir être soulignée en tout premier lieu. Les juridictions maritimes étant engendrées par des côtes, c'est la configuration de ces dernières qui gouverne seule la délimitation; la dimension de la masse terrestre derrière les côtes est indifférente. En ne réservant pas le moindre écho au thème canadien, répété jusqu'à l'obsession, du "territoire exigu" de Saint-Pierre-et-Miquelon, la sentence confirme le rejet catégorique opposé à ce genre de considérations par *Libye/Malte*[39] et par *Guinée/Guinée-Bissau*[40].

45. S'agissant des côtes elles-mêmes, le tribunal rejette toute gradation de poids, de valeur ou d'intensité dans leur pouvoir générateur de juridictions maritimes. Les Etats-Unis n'avaient pas réussi à faire admettre par la Chambre de la Cour que les projections de certaines côtes, dites "principales", devaient l'emporter sur les projections d'autres côtes, dites "secondaires". La Libye n'avait pas convaincu la Cour que ses longues côtes continentales devaient jouir d'un pouvoir générateur de projections maritimes plus "intense" que les courtes côtes insulaires de Malte. On se félicitera que le Canada n'ait pas davantage eu de succès avec sa thèse de la projection relative (*relative reach*) des côtes. Le tribunal rejette en effet catégoriquement à la fois la thèse selon laquelle certains segments côtiers pourraient avoir "une projection augmentée ou diminuée en fonction de leur longueur" (par. 45) et la théorie selon laquelle les côtes d'une île dépendante engendreraient des juridic-

[39] *Libye/Malte, C.I.J. Recueil 1985*, p. 41, par. 49.
[40] Par. 119.

tions maritimes moins étendues que celles d'un Etat insulaire indépendant (par. 48 et 49). Ainsi se trouve confirmé, par-delà toute distinction selon la longueur du littoral et selon le caractère continental ou insulaire du territoire, le principe posé par la Cour selon lequel "[t]out Etat côtier ayant un titre égal . . ., les côtes de chaque Etat sont présumées avoir la même aptitude à engendrer une zone de juridiction"[41] — étant bien entendu que "l'existence d'un titre égal n'implique pas l'égalité de l'étendue"[42] de leurs zones maritimes dans la délimitation.

46. La sentence fera date, en second lieu, en ce qui concerne la théorie des circonstances géographiques particulières, et notamment le rôle des îles dans la délimitation. Pour l'essentiel, on le sait, la théorie des circonstances géographiques particulières consiste à réduire ou à effacer l'incidence de caractéristiques géographiques regardées par le juge comme "particulières", "inhabituelles", "non essentielles", "non significatives", lorsque cette incidence lui apparaît exagérée et disproportionnée par rapport à l'importance de cet accident et, par conséquent, comme "générateur d'inéquité". Comme l'a dit le juge Lachs, président du tribunal arbitral *Guinée/Guinée-Bissau*, il importe "d'éviter que l'un des deux (Etats) subisse une grave amputation au bénéfice de l'autre et que son littoral . . . soit exagérément réduit à cause d'un caprice de la nature"[43]. Cette théorie s'applique à toutes sortes de particularités géographiques mineures : concavité du littoral, saillants de la côte, et surtout îles, îlots et rochers. Le prototype en est fourni par le célèbre diagramme produit par le professeur Jaenicke au nom de la République fédérale d'Allemagne dans les affaires de la *Mer du Nord*[44], qui montre qu'un saillant presque insignifiant de l'une des côtes (ou la présence d'un îlot devant l'une des côtes) entraîne un déplacement considérable de la ligne d'équidistance au bénéfice de l'Etat doté de cet accident mineur et au détriment de l'autre Etat, cet effet étant plus marqué dans le cas des côtes adjacentes que de côtes se faisant face et s'accentuant au fur et à mesure que l'on s'éloigne davantage de la côte[45].

47. En dépit de sa séduction, cette théorie est en réalité viciée par une grave contradiction interne. Il ne faut pas refaire la nature, il faut accepter la géographie telle qu'elle est, proclame la jurisprudence d'un côté. D'un autre côté, cependant, la géographie ne se soucie guère d'équité; le juge va en conséquence, au nom de l'équité, faire œuvre volontariste et substituer le jugement humain aux données de la nature. Retoucher la nature pour mieux la respecter, a-t-on dit — mais n'est-ce

[41] *Libye/Malte, C.I.J. Recueil 1985*, p. 83. par, 21.
[42] *Op. cit.*, p. 43, par. 54.
[43] Cf. *Guinée/Guinée-Bissau*, par. 103.
[44] *C.I.J. Mémoires, Plateau continental de la mer du Nord*, vol. II, p. 29.
[45] Ainsi conçue, la théorie des caractéristiques géographiques constitue la transposition au droit coutumier de la délimitation maritime du concept de circonstances spéciales élaboré par la Commission du droit international dans le cadre du droit conventionnel de l'article 6. Si la terminologie n'est pas la même, l'idée l'est — à une exception près : alors que la théorie des circonstances spéciales de l'article 6 intéresse l'ajustement d'une ligne d'équidistance, la théorie des caractéristiques géographiques particulières s'applique à toute ligne, quelle que soit la méthode selon laquelle elle est tracée.

pas là reconnaître que la théorie des circonstances géographiques particulières est minée jusque dans sa substance même ? Que signifie, au demeurant, le caractère inhabituel, ou anormal, ou insignifiant, prêté à telle île, à tel saillant, à telle concavité ? Pas plus qu'elles ne sont équitables ou inéquitables, la nature et la géographie ne sont normales ou anormales. La géographie est ce qu'elle est — et tout jugement de valeur porté sur elle ne peut conduire qu'à la modifier.

48. Les difficultés soulevées par cette théorie étaient apparues au grand jour dans plusieurs affaires antérieures. En particulier, le traitement différencié des îles — plein effet, effet partiel, effet nul, enclave, semi-enclave, etc. — a fait l'objet de décisions contradictoires, malaisées à comprendre, impossibles à synthétiser, toujours sujettes à critique. Dans notre affaire les parties ont plus particulièrement débattu de deux questions : les îles de Saint-Pierre-et-Miquelon doivent-elles être regardées comme une circonstance géographique particulière alors même que ces îles ne sont pas un accident de l'une des côtes en jeu mais constituent elles-mêmes la cause et le sujet de la délimitation ? La différenciation du traitement des îles est-elle fonction de leur statut politique[46] ? Si, comme on l'a vu, le tribunal a expressément refusé de moduler l'étendue des droits maritimes des îles en fonction de leur statut politique (par. 49), en revanche il n'a dit mot de leur caractère d'accident géographique particulier dont l'effet pourrait être réduit ou éliminé. Si l'on rapproche ce silence de celui gardé sur les effets de la concavité en tant que circonstance géographique particulière, on peut penser que le tribunal n'a pas attaché grand intérêt à cette théorie et qu'il a finalement choisi de prendre la nature comme elle est. Une côte est une côte, qu'elle soit insulaire ou continentale; et une côte insulaire est une côte, qu'elle soit celle d'un Etat insulaire indépendant ou d'une île appartenant à un autre Etat. Le concept d'île est de surcroît quelque peu relatif lui-même : après tout, comme le note le tribunal, Terre-Neuve est également une île (par. 52). Si cette lecture de la sentence est exacte, je ne puis qu'approuver ce coup de frein donné à l'impossible théorie des circonstances géographiques particulières et l'extraordinaire simplification apportée ainsi au droit de la délimitation marine.

49. Mais ce dont je me félicite le plus, c'est qu'aux paragraphes 85 à 87 la sentence contribue de matière décisive à l'apaisement des tensions entre les deux pays amis que sont le Canada et la France. Le tribunal prend soin, en effet, de relever que, par-delà la délimitation de la frontière maritime, les droits de pêche des deux pays demeurent régis par l'accord de pêche du 27 mars 1972 — tant et si bien que la délimitation issue de la sentence ne devrait pas avoir d'impact préjudiciable aux droits de pêche des deux Etats dans la région. Tout en observant à juste

[46] Le problème de l'incidence du statut politique des îles s'était déjà posé dans *Libye/Malte*, mais sous une forme différente. Dans *Libye/Malte* c'était l'extension aux Etats insulaires de la modulation appliquée jusque-là aux îles dépendantes qui était en cause. Ici la question débattue était différente, et à certains égards inverse : elle était de savoir si le statut dépendant des îles devait provoquer une réduction de leurs droits maritimes (par. 48).

titre qu'il ne lui appartient pas d'appliquer ou d'interpréter cet accord, le tribunal rappelle que l'essentiel de l'accord consiste: de la part du Canada, à reconnaître aux ressortissants français le droit de pêcher au large de la côte atlantique du Canada — y compris, le tribunal y insiste, dans la zone disputée; de la part de la France, à accorder la réciproque aux ressortissants canadiens au large de Saint-Pierre-et-Miquelon. Le droit de pêche ainsi reconnu par chacun des pays aux ressortissants de l'autre sur un pied de pleine et entière réciprocité est établi, selon l'accord, "sous réserve d'éventuelles mesures de conservation des ressources, y compris l'établissement de quotas". C'est, la sentence le rappelle, dans la seule finalité de la conservation des ressources que des quotas peuvent être institués; toute finalité autre serait contraire à l'accord. Le souci du tribunal de voir prendre fin la "guerre des quotas" qui a envenimé dans un passé récent les rapports des deux pays est évident, en même temps que son souhait de voir la politique de partage des ressources sur la base de la réciprocité reprendre son cours normal.

50. Le fait que les droits de pêche des deux parties continuent dans l'avenir à être régis par l'accord de 1972 ne signifie cependant pas que la délimitation soit sans intérêt concret. D'abord, comme je l'ai déjà noté, une délimitation est une opération politique et juridique avant même que d'être économique. Ensuite, comme l'a relevé l'agent de la France, "l'accord de 1972 est fondé sur un équilibre qui suppose que chaque partie dispose d'un espace maritime". On peut espérer que, sur le fondement des paragraphes 85 à 87 de la sentence, les deux gouvernements sauront désormais conduire leurs relations de pêche en conformité avec la lettre et l'esprit de l'accord de 1972. Les assurances formelles et répétées données par la partie canadienne au cours de la procédure au sujet de la garantie et de la protection des droits de pêche français par l'accord de 1972 devraient permettre au gouvernement et aux intérêts français d'être rassurés. Non seulement en cette matière, "comme dans tous les autres domaines, le droit international exige une application raisonnable"[47], mais, ainsi que le note la sentence, les deux parties ont reconnu que leur intérêt commande de demeurer fidèles l'une et l'autre à leur politique séculaire de coopération et de réciprocité.

51. Sur un autre point encore, qui a constitué une source de friction dans le passé récent, le tribunal veut faire œuvre d'apaisement. Au cours de la procédure la France a exprimé des craintes au sujet de certaines mesures de réglementation prises par le Canada dans sa zone de 200 milles, susceptibles selon elle de gêner la navigation à destination et en provenance du port de Saint-Pierre. Le Canada, de son côté, a affirmé au cours de la procédure son attachement au principe de la liberté de navigation à travers la zone de 200 milles, que garantit, a-t-il rappelé, l'article 58 de la convention de 1982, lequel reflète, sans contestation possible, l'état du droit coutumier en la matière. Tout en observant que la question n'est pas devant lui, le tribunal a pris note de la

[47] *Barcelona Traction, C.I.J. Recueil 1970*, p. 48, par. 93.

"concordance" des parties sur cette question (par. 88). Là encore, les tensions devraient être évitées dorénavant.

52. Ces prises de position sur la pêche et la navigation sont parmi les plus importantes de la sentence. Tout conflit entre le Canada et la France est particulièrement regrettable, et je suis heureux que le tribunal ait tenu à contribuer à remettre les relations franco-canadiennes sur le chemin de l'amitié et de la coopération. Je n'en regrette que davantage que la délimitation maritime déséquilibrée — donc inéquitable, donc contraire au droit — à laquelle la sentence a abouti m'ait empêché de joindre ma voix, comme j'aurais aimé le faire, à celle de la majorité du tribunal.

OPINION DISSIDENTE DE M. ALLAN E. GOTLIEB

1. Je ne peux donner mon accord à la décision de la majorité du Tribunal d'arbitrage, car je considère que, d'une manière toute générale, l'arrêt n'est pas conforme au droit international. D'après le droit international, un tribunal doit, lorsqu'il procède à une délimitation maritime, employer des principes équitables afin d'aboutir à un résultat équitable. La solution exposée par la majorité n'emploie pas des principes équitables et n'aboutit pas à un résultat équitable.

2. A mon avis, c'est essentiellement à deux égards que la majorité du Tribunal n'a pas employé des principes équitables : premièrement, lorsqu'elle a déterminé la géographie pertinente, aussi bien les longueurs des côtes que la zone pertinente; deuxièmement, lorsqu'elle a adopté une solution qui tente de combiner deux méthodes contradictoires et incompatibles pour la délimitation des espaces maritimes auxquels peut prétendre un petit groupe d'îles situées près d'une côte beaucoup plus longue. La méthode employée par la majorité n'est donc pas conforme à des principes équitables.

3. En outre, la majorité du Tribunal a abouti à un résultat qui est disproportionné au regard de la géographie pertinente. Un résultat si disproportionné ne peut être équitable. Il s'ensuit que ce résultat n'est pas conforme au droit international.

4. Je ne suis pas non plus d'accord avec la majorité du Tribunal sur un certain nombre de points subsidiaires : d'abord, lorsqu'il donne insuffisamment de poids au statut politique comparé de Saint-Pierre-et-Miquelon (SPM) et du Canada; ensuite, lorsqu'il fait appel à la notion de zone contiguë pour délimiter la zone économique exclusive et le plateau continental de SPM; enfin, quant à la manière dont il traite la question du plateau continental étendu au-delà de la limite de la zone économique exclusive de 200 milles du Canada.

I. *Le Tribunal n'a pas employé des principes équitables*

A. *La géographie pertinente*

5. C'est à juste titre que la majorité du Tribunal a déclaré que "les caractéristiques géographiques sont au cœur du processus de délimitation". Pour déterminer la méthode appropriée de délimitation, il faut s'en référer aux circonstances géographiques (arbitrage *anglo-français*, par. 96). Comme il a été déclaré dans l'affaire *Tunisie/Libye* (par. 73), "c'est la côte du territoire de l'Etat qui est déterminante pour créer le titre sur les étendues sous-marines bordant cette côte". Il n'est pas un point qui ait été établi avec plus d'autorité que le fait que "c'est . . . en partant de la côte des Parties qu'il faut rechercher jusqu'où les espaces sous-marins relevant de chacune d'elles s'étendent vers le large"

(*Libye/Malte*, par. 47; *Tunisie/Libye*, par. 74). Il est donc nécessaire de commencer toute délimitation par une analyse de la géographie pertinente, ce que la majorité du Tribunal a fait en l'espèce.

6. Il y a, de par le monde, peu de configurations dans lesquelles les disparités entre longueurs de côte, aux fins d'une délimitation, sont plus marquées ou dans lesquelles la disproportion est plus frappante qu'en l'espèce. C'est cette disproportion même qui a conduit la majorité du Tribunal à rejeter, à juste titre selon moi, l'application de l'équidistance en tant que méthode. Toutefois, bien que je sois d'accord avec la majorité quant à l'usage qu'il convient de faire des rapports entre les côtes, selon l'affaire *Libye/Malte*, j'estime que la majorité a retenu des chiffres erronés pour la longueur des côtes pertinentes canadiennes aussi bien que pour celle des côtes pertinentes de SPM. En outre, j'estime que la majorité a aussi mal déterminé la zone pertinente aux fins de la vérification de la solution énoncée par le Tribunal, pour constater si cette solution est équitable.

7. Dans sa décision, la majorité du Tribunal a fixé à 29,85 m.m. la longueur du littoral pour SPM et à 455,6 m.m. la longueur du littoral pour le Canada. Le rapport entre ces deux nombres est de 15,3 à 1. La majorité a rejeté le rapport de 21,4 à 1 présenté par le Canada. Or, il est clair que les longueurs de côte fixées par la majorité découlent de mesures qui figurent dans le mémoire du Canada et qui ont été sélectionnées et modifiées par la majorité. A mon avis, la majorité a fait erreur en modifiant les longueurs de côte indiquées par le Canada.

i) *La longueur du littoral de Saint-Pierre-et-Miquelon*

8. La première modification concerne la longueur du littoral de SPM. La majorité du Tribunal a adopté le chiffre de 29,85 m.m. qu'elle déclare correspondre à la longueur des côtes de SPM "mesurée par segments, d'après leurs lignes de direction générale". Le chiffre avancé par le Canada pour la longueur des côtes de SPM était de 24 m.m. (mémoire du Canada, par. 47). Mais le chiffre de 29,85 m.m. se trouve aussi dans le mémoire du Canada. Aucun chiffre général ne figure dans le mémoire de la France.

9. Au paragraphe 43 (p. 26), le Canada déclare : "La longueur totale nord-sud des deux sections de la côte de Miquelon est de 21,6 milles marins." A la fin de ce paragraphe, le Canada ajoute que Langlade "est séparée de l'île de Saint-Pierre par La Baie, chenal d'une largeur de 5,25 milles marins". Enfin, au paragraphe 44 (p. 26), le Canada déclare : "La côte méridionale de Saint-Pierre . . . s'étend sur trois milles marins, de Pointe du Diamant à Tête de Galantry."

10. Ces mesures sont résumées dans la note infrapaginale 28 du mémoire du Canada :

> Du cap du Nid à l'Aigle (la pointe la plus au nord sur Miquelon) à Pointe du Diamant (la pointe la plus au sud sur Saint-Pierre), la longueur totale des côtes de Saint-Pierre-et-Miquelon est de 24 milles marins (18 milles marins si l'on exclut la dune de Langlade). *Si les côtes sont divisées en segments*, la longueur totale est alors de 29,85 milles marins, si l'on inclut la dune de Langlade et La Baie, le chenal

entre Miquelon et Saint-Pierre (ou de 18,6 milles marins si ces caractéristiques sont exclues). Ces distances ont été mesurées comme suit : de cap du Nid à l'Aigle à Pointe du Ouest, 21,6 milles marins (15,6 milles marins si l'on exclut la dune); de Pointe du Ouest à Pointe du Diamant en traversant La Baie, 5,25 milles marins; de Pointe du Diamant à Tête de Galantry, 3 milles marins [c'est moi qui souligne].

11. Le Canada a donc clairement déterminé quelle serait la longueur des côtes de SPM *mesurée par segments*. Toutefois, le chiffre utilisé par le Canada pour le rapport des côtes n'était pas de 29,85 m.m. mais de 24 m.m. La raison en est claire si l'on examine la jurisprudence et si l'on compare ensuite la méthode employée par le Canada pour mesurer les côtes de SPM et la méthode employée par le Canada pour mesurer les côtes canadiennes.

12. On pourrait mesurer les côtes selon leurs sinuosités, ce qui donnerait un chiffre énorme pour le Canada, en raison de la nature de ses côtes, et un très petit chiffre pour SPM, en raison de la nature des côtes de SPM. Le rapport qui en résulterait ne traduirait pas la réalité géographique.

13. Une autre méthode consiste à essayer de mesurer la "direction générale" de la côte. Cette méthode a été employée par la C.I.J. dans les affaires du *Plateau continental de la mer du Nord* (*C.I.J. Recueil 1969*, par. 98), dans l'affaire *Tunisie/Libye* (*C.I.J. Recueil 1982*, par. 131) et dans l'affaire du *Golfe du Maine* (*C.I.J. Recueil 1984*, par. 31). Le problème inhérent à la mesure de la direction générale des côtes tient au fait qu'il existe de nombreuses manières de tracer des lignes qui suivent plus ou moins la géographie exacte du littoral. Lorsque le but est d'obtenir un *rapport* entre deux côtes, ce qui compte, ce n'est pas de savoir à quel degré de généralisation on recourt, mais bien de recourir au même degré de généralisation pour chacune des deux côtes que l'on mesure.

14. La figure 5 du mémoire du Canada représente l'idée que le Canada se fait de la direction générale des côtes pertinentes. C'est sur la base de ces lignes que le Canada a calculé le rapport de 514,4 milles à 24 milles. Le Canada a utilisé une ligne unique nord-sud pour mesurer le littoral de SPM, obtenant ainsi un chiffre de 24 milles. Si l'on examine la figure 5, on constate (au premier coup d'œil) que le degré de généralisation qu'implique l'utilisation d'une seule ligne droite pour SPM équivaut au degré de généralisation qui a marqué la mesure des côtes canadiennes.

15. La figure 5 du mémoire du Canada montre que les lignes de direction générale pour le littoral canadien ne brisent pas la côte en petits segments. C'est ainsi qu'une ligne droite unique traverse le cap Pine, la péninsule de Burin et le cap Smoky, sur l'île du Cap-Breton. Le Canada exclut aussi toutes les baies de moins de 24 milles marins (mémoire du Canada, par. 30, p. 22). Cette manière générale de voir les choses a conduit à une *seule* ligne droite reliant Connaigre Head au cap Ray. Le Canada s'est servi de 12 lignes droites pour parvenir à une mesure de 514,4 m.m. La longueur moyenne des lignes employées par le Canada pour le littoral canadien est donc de 42,9 m.m.

16. S'il fallait adopter la position de la majorité du Tribunal et mesurer le littoral de SPM par segments, on adopterait un degré d'approximation géographique beaucoup plus grand et on donnerait plein effet à des "caractéristiques microgéographiques". La majorité a employé trois lignes pour mesurer le littoral de SPM. Ces lignes mesurent 21,6 m.m., 5,25 m.m. et 3 m.m. La longueur moyenne des lignes utilisées par la majorité est donc de 9,95 m.m. Si l'on voulait adopter ce degré d'approximation pour mesurer le littoral de SPM, on aurait dû alors retracer les lignes de direction générale des côtes canadiennes en utilisant le même degré d'approximation. Il s'ensuivrait que le littoral du Canada, mesuré selon la direction générale, serait de bien plus que 514,4 milles marins. Si la longueur du littoral segmenté de SPM et le littoral également segmenté du Canada sont comparés, on aboutit à un rapport au moins aussi grand que le rapport auquel le Canada arrive avec ses lignes de direction plus générale aussi bien pour SPM que pour le littoral canadien. En d'autres termes, quel que soit le degré de généralisation de la direction auquel on recourt, tant que le même degré de généralisation est employé pour les deux littoraux, le résultat devrait être un rapport d'au moins 24,4 à 1, si ce n'est plus.

17. A mon avis, la majorité du Tribunal a donc fait erreur lorsqu'elle a modifié la longueur du littoral de SPM car elle a, ce faisant, adopté un degré d'approximation différent pour les côtes de SPM et pour celles du Canada. La longueur du littoral de SPM devait rester de 24 milles marins.

ii) *La longueur du littoral canadien*

18. La majorité du Tribunal a également procédé à une seconde modification des longueurs de côte présentées par le Canada. La majorité a exclu les segments du littoral canadien pris en compte dans l'accord de délimitation de 1972 entre le France et le Canada, dans le passage suivant :

> [L]'argumentation de la France permet d'exclure la ligne canadienne traversant la baie de la Fortune et faisant face au littoral nord et est de Miquelon et de Saint-Pierre, jusqu'à la longitude du point 9 de l'accord de 1972. Les côtes septentrionale et orientale de Miquelon et de Saint-Pierre ne font pas face à la zone en litige et c'est donc à juste titre que le Canada n'en a pas tenu compte lorsque la longueur totale des côtes des îles françaises a été estimée dans son mémoire. Toutefois, il faudrait traiter semblablement la côte canadienne opposée, qui s'étend derrière les îles françaises. Bien que ce segment de côte ait été pris en compte dans l'accord de 1972 pour une ligne de délimitation ininterrompue et continue entre les îles et la masse terrestre, il faudrait l'omettre en calculant la longueur du littoral faisant face à la zone en litige (par. 30).

19. Qu'il me soit permis de dire que le raisonnement de la majorité exposé dans ce passage est défectueux. Les côtes nord et est de SPM doivent être exclues du simple fait qu'elles ne font pas face à la zone à délimiter. Les côtes ne faisant pas face à une zone à délimiter ne donnent pas lieu à revendication et ne sont pas pertinentes. Ni le Canada ni la France n'ont fait valoir que les côtes nord et est de SPM donnaient lieu à la revendication dans la zone pertinente. Les côtes nord

et est de SPM n'intéressent pas plus la délimitation sur laquelle il faut maintenant statuer que les côtes nord et est de Terre-Neuve ou, en l'occurrence, de la Normandie. Il est donc juste d'exclure de toute mesure comparative des côtes la longueur du littoral nord et est de SPM.

20. Il en va tout autrement du littoral canadien qui fait face aux points 1 à 9 de la délimitation de 1972. Ces segments du littoral de Terre-Neuve, que la majorité a exclus au motif que c'est sur eux que repose la délimitation de 1972, font tous face à la zone à délimiter et donnent lieu à une partie des revendications canadiennes. Il est clair, par conséquent, que ces segments du littoral sud de Terre-Neuve sont tous pertinents aux fins de la présente délimitation, même ceux qui se trouvent "derrière" Saint-Pierre-et-Miquelon.

21. Dans l'arbitrage *anglo-français*, le littoral de la France situé derrière les îles Anglo-normandes n'a pas été déclaré "épuisé" par la délimitation des espaces se trouvant directement entre ces îles et la France. C'est ce littoral même qui a été considéré comme engendrant le titre sur la zone située au nord et à l'ouest desdites îles. Loin d'être "épuisé", ce littoral de la France a été admis à "sauter" par-dessus la zone accordée aux îles Anglo-Normandes. Le Tribunal arbitral a déclaré sans ambages qu'une petite île située en face de la côte d'une masse terrestre ne fait pas obstacle à l'extension en mer de cette côte derrière elle (décision en l'affaire *anglo-française*, par. 192). Il y a lieu de relever que, dans l'affaire *anglo-française*, c'est la France qui a allégué que les côtes françaises derrière les îles Anglo-Normandes n'étaient pas "épuisées".

22. Le littoral de Terre-Neuve, du point 1 au point 9, fait face à la zone à délimiter et est à l'origine d'une grande partie des revendications du Canada. Dès lors, c'est essentiellement à deux égards que ce segment du littoral de Terre-Neuve se distingue des côtes nord et est de SPM, celles-ci ne faisant pas face à la zone à délimiter et n'étant à l'origine d'aucune revendication. En outre, si l'on examine la sentence, on constate qu'il y aurait dans tous les cas un "saut" dans la présente affaire. Selon la sentence, le littoral de Terre-Neuve saute par-dessus la mer territoriale et la zone économique exclusive accordée à SPM, si ce n'est dans le corridor de 10,5 milles, et il fait naître pour le Canada un titre maritime au large. C'est pourquoi on comprend mal le raisonnement du Tribunal lorsqu'il exclut environ 59 milles marins du littoral sud de Terre-Neuve.

23. Pas un segment du littoral sud de Terre-Neuve utilisé lors de la délimitation de 1972 ne devrait être écarté aux fins de déterminer la proportionnalité entre les côtes de SPM et celles du Canada. La longueur des côtes canadiennes devrait rester de 514,4 milles marins.

24. S'il devait y avoir quelque raison d'exclure une partie du littoral sud de Terre-Neuve comme l'a fait la sentence — et je ne suis pas d'accord qu'il y en ait une —, selon le raisonnement suivi, ce ne pourrait être que parce qu'une partie du littoral de Terre-Neuve est barrée par SPM et n'engendre pas, dans la sentence finale, de titre maritime pour Terre-Neuve sur la zone pertinente. Même si cela consti-

tuait un fondement juridique adéquat pour écarter une partie de la longueur du littoral de Terre-Neuve, ce que je nie, ce raisonnement ne permettrait que d'écarter que la partie du littoral de Terre-Neuve qui est vraiment barrée dans la sentence. La seule longueur du littoral de Terre-Neuve qui est barrée et qui, de l'avis du Tribunal, n'engendre pas de titre au large, est la longeur de 10.5 m.m. du littoral se trouvant directement au nord du corridor. C'est pourquoi, même si le raisonnement de la majorité est correct, la longueur du littoral de Terre-Neuve serait de 503,9 m.m. (514,4 moins 10,5) et non de 455,6 m.m.

25. Pour les raisons juridiques qui précèdent, la longueur exacte du littoral canadien devrait être de 514,4 milles marins et la longueur exacte du littoral de Saint-Pierre-et-Miquelon devrait être de 24 milles marins. Le rapport entre les deux littoraux est donc de 21,4 à 1.

iii) *La superficie de la zone pertinente de délimitation*

26. Pour déterminer si une délimitation est conforme à l'équité, il faudrait recourir, autant que possible, au critère de la proportionnalité pour voir s'il y a un "rapport raisonnable" entre les longueurs des côtes des Parties et les espaces maritimes qui relèvent d'elles (affaire de la *Mer du Nord*, par. 98).

27. Après avoir déterminé les côtes pertinentes, le tribunal devrait donc essayer de déterminer la zone pertinente. Il est généralement assez facile de déterminer les longueurs des côtes pertinentes mais il arrive qu'il soit beaucoup plus difficile de déterminer la zone maritime dont il faut se servir pour vérifier la proportionnalité de la sentence. Le risque est d'adopter une attitude subjective ou *ad hoc* pour définir la zone pertinente. Cette zone ne devrait pas être arbitrairement définie, faute de quoi elle n'aurait pas de signification; elle devrait au contraire être déterminée par référence à la géographie côtière et à d'autres facteurs objectifs. La zone pertinente devrait représenter l'extension raisonnable vers le large des côtes des parties. Il n'est pas non plus nécessaire, encore que cela soit peut-être utile, que la zone pertinente englobe la totalité des espaces revendiqués par les parties ou accordés par le Tribunal (*Golfe du Maine*, par. 231).

28. Il se peut qu'il ne soit pas possible, dans certaines situations géographiques, de déterminer une zone pertinente. Dans l'opinion qu'il a rédigée pour l'affaire *Libye/Malte* (opinion dissidente fondée sur des motifs autres que la proportionnalité), M. Mosler a déclaré que, lorsque les côtes de deux Etats limitrophes n'ont pas une configuration concave mais qu'elles suivent une ligne côtière droite, il n'est tout simplement pas possible de définir une zone pertinente (*Libye/Malte*, p. 115). Il n'y aura tout simplement pas de facteurs objectifs pour limiter la zone. Or, en présence d'une concavité naturelle, il est possible de déterminer une zone pertinente non arbitraire. Dans la présente affaire, aussi bien le Canada que la France ont vu dans la concavité formée par Terre-Neuve et les côtes du cap Breton la caractéristique géographique prédominante de la région. Cette zone concave, appelée approches du golfe par le Canada et antichambre du golfe par la France, est une zone naturelle qui

peut être définie objectivement et employée pour formuler des rapports de proportionnalité. La zone pertinente des approches du golfe est délimitée par les côtes pertinentes du Canada et par une ligne droite reliant le cap Canso au cap Race. La zone qui en résulte a une superficie de 22 039 milles marins carrés.

29. A mon avis — je l'exposerai dans la section suivante — aussi bien une enclave élargie qu'un corridor méridional peut constituer une solution qui se justifie, si cette solution est utilisée seule. L'enclave élargie serait contenue dans la zone pertinente des approches du golfe que j'ai déterminée. En conséquence, si c'est la solution de l'enclave élargie qui est utilisée, il n'y a pas de difficulté à vérifier sa proportionnalité en se servant de la zone pertinente des approches du golfe.

30. En revanche, si c'est la solution du corridor qui est utilisée, une part importante du corridor va s'étendre au-delà de la zone pertinente des approches du golfe. Deux voies s'offraient au Tribunal en l'occurrence. Premièrement, le Tribunal pouvait déterminer le rapport entre les espaces accordés à SPM et au Canada à l'intérieur de la zone pertinente des approches du golfe et ignorer les espaces extérieurs à cette zone. C'est essentiellement de cette méthode que s'est servie la Chambre de la Cour internationale de Justice dans l'affaire du *Golfe du Maine* : elle a déclaré qu'il était inutile de définir des zones pertinentes qui englobent toutes les revendications des parties. Deuxièmement, le Tribunal pouvait commencer par la zone pertinente des approches du golfe, puis étendre cette zone, de façon non arbitraire, pour y inclure la zone accordée en dehors des approches du golfe. En plaidoirie, le Canada a élargi la zone pertinente, pour les besoins de son argumentation, en créant une vaste zone englobant la revendication que la France fondait sur l'équidistance et qui portait sur des espaces situés en dehors de la zone pertinente des approches du golfe. Le Canada a ensuite utilisé une zone intérieure (sa zone pertinente originale) et une zone extérieure (la zone élargie au-delà de la zone originale) et il a soumis la revendication française à un test comportant deux étapes (compte rendu intégral du 2 août 1991, p. 470 à 478). A mon avis, le Canada aurait aussi pu employer la totalité de la zone pertinente étendue pour comparer la totalité de la zone revendiquée par la France à celle qui est laissée au Canada, plutôt que de mesurer les rapports dans les deux zones. De même, si les revendications des parties sont rejetées, comme elles l'ont été en l'occurrence, la sentence du Tribunal accordant à SPM une zone extérieure aux approches du golfe, on peut élargir la zone pertinente des approches du golfe de manière qu'elle comprenne la zone accordée à SPM par le Tribunal à l'extérieur des approches du golfe. Si c'est la solution du corridor qui est adoptée, il est préférable, à mon avis, d'élargir la zone pertinente de cette manière et d'y inclure la part des espaces auxquels SPM peut prétendre à l'extérieur de la zone pertinente, plutôt que d'ignorer les espaces situés à l'extérieur de la zone pertinente pour déterminer la proportionnalité.

31. Bien qu'il semble qu'il se justifie d'étendre la zone pertinente naturelle des approches du golfe pour englober le corridor accordé

à SPM, il ne faut pas oublier qu'une expansion de la zone pertinente naturelle crée une zone pertinente qui, bien que n'étant pas arbitraire, est artificielle. La zone pertinente plus large, du fait qu'elle est destinée uniquement à englober le corridor, semble exagérer la dimension de la zone pertinente. En conséquence, il faut être attentif lorsqu'on examine le rapport entre la zone accordée à SPM et celle qui est "laissée" au Canada, la zone "laissée" au Canada étant dans une certaine mesure exagérée.

32. Il faut faire preuve d'une prudence semblable lorsque l'on vérifie la proportionnalité de la solution de l'enclave en comparant des espaces fondés sur la zone pertinente des approches du golfe. Bien que la concavité des approches du golfe ne soit pas une construction artificielle mais une caractéristique naturelle de la géographie côtière, il n'est pas question que l'utilisation d'une ligne droite en travers de la concavité, du cap Canso au cap Race, délimite la plus petite zone possible à l'intérieur de cette concavité. C'est pourquoi, lorsqu'on examine le rapport entre les espaces fondés sur la zone des approches du golfe, il faut être attentif car le rapport obtenu aura tendance à sous-estimer la part d'espaces maritimes laissés au Canada par la sentence. Ces considérations n'enlèvent pas toute signification au test de la proportionnalité, mais elles obligent à faire preuve de prudence lorsqu'on interprète les rapports obtenus pour déterminer si une solution proposée ou adoptée est équitable.

33. Pour apprécier la solution du corridor, on devrait donc commencer par la zone pertinente originale des approches du golfe. Pour englober le territoire, la ligne reliant le cap Canso au cap Race doit être "brisée". On obtient une ligne s'étendant du cap Canso à l'angle sud-ouest du corridor puis, de là, à travers la face méridionale du corridor jusqu'à l'angle sud-est puis, de là, jusqu'au cap Race. La zone qui en résulte, telle que l'expert du Tribunal l'a déterminée, a une superficie de 48 791,5 milles marins carrés.

34. Lorsqu'il a examiné la géographie pertinente, au début de sa sentence, le Tribunal a défini, comme zone pertinente, "la concavité géographique formée par Terre-Neuve et la Nouvelle-Ecosse". Toutefois, le Tribunal n'a pas défini les limites précises de cette zone avant la fin de la sentence. A lui seul, ce fait devrait faire craindre que la zone pertinente utilisée par la majorité est une zone *ad hoc*. A la fin de la sentence, lorsque la majorité se propose de vérifier la proportionnalité de la solution, le Tribunal adopte une zone pertinente mesurant 63 051 milles marins carrés. Selon le Tribunal, cette zone, qu'on peut voir sur la carte jointe à la sentence, représente la zone définie par les projections vers le sud, sur une distance de 200 milles marins, des côtes méridionales de Terre-Neuve et de SPM. Selon la majorité, c'est pour les raisons suivantes qu'on s'en est servi comme zone pertinente. Le titre de SPM au corridor orienté vers le sud se fonde sur son titre à une projection frontale ininterrompue vers le sud. Les segments adjacents du littoral sud de Terre-Neuve ont aussi un titre à des projections frontales ininterrompues. La majorité déclare que, pour évaluer la proportion-

nalité de la solution, il faut comparer "ce qui est comparable". Autrement dit, on devrait comparer la projection de SPM vers le sud aux projections de Terre-Neuve vers le sud. La majorité déclare, par conséquent, que la zone engendrée par les projections frontales du littoral sud de Terre-Neuve et du littoral sud de SPM comprend la zone pertinente (par. 93).

35. La zone pertinente adoptée par la majorité du Tribunal est une zone arbitrairement définie qui recouvre une partie beaucoup trop grande de l'espace océanique. Le critère de la projection frontale ne constitue pas un fondement logique pour délimiter l'étendue de la zone pertinente. En recourant au critère de la projection frontale, la majorité a traité le littoral sud de Terre-Neuve comme étant la seule caractéristique géographique importante de la région. C'est ignorer entièrement le fait que la région est avant tout une concavité, comme le Tribunal lui-même l'a constaté, et que la zone à l'intérieur de la concavité est la seule zone naturelle pertinente. En outre, si la majorité a raison de considérer que la seule caractéristique géographique importante est le littoral sud de Terre-Neuve, qui est rectiligne, la zone pertinente utilisée par la majorité doit être incorrecte car il n'est *pas* possible de définir une zone pertinente quand "les côtes de deux Etats limitrophes n'ont pas une configuration concave" (*Libye/Malte*, M. Mosler, p. 115).

36. Outre le fait que la zone pertinente adoptée par la majorité du Tribunal est arbitraire et qu'elle est sans rapport avec la géographie naturelle, elle est sans rapport aucun avec la zone océanique qui était en litige entre les Parties. La zone pertinente du Tribunal met en cause de vastes espaces océaniques qui ne sont pas proches des espaces revendiqués par la France et qui ne peuvent dès lors être pertinents.

37. En conclusion, la seule zone pertinente non arbitraire est constituée par les approches du golfe. Si une solution est adoptée, qui accorde à SPM une zone s'étendant à l'extérieur de la zone pertinente, la zone pertinente pour vérifier la proportionnalité peut être étendue autant qu'il est nécessaire pour englober la zone située à l'extérieur de la zone pertinente originale. Il faut faire preuve de prudence lorsqu'on interprète les rapports que donnent ces deux zones pertinentes. Selon moi, la zone pertinente de la majorité ne trouve pas d'appui dans le droit international.

B. *Les deux méthodes employées par la majorité pour sa solution sont incompatibles*

38. Il faut commencer par reconnaître la grande disparité des longueurs de côte avant d'apporter une quelconque solution à la présente délimitation. J'ai déterminé que le rapport entre les longueurs de côte est de 21,4 à 1. La majorité a adopté un rapport de 15,3 à 1. Dans un cas comme dans l'autre, la disparité des longueurs de côte est grande. Etant donné cette disparité, l'emploi de l'équidistance comme méthode de délimitation, ainsi que le préconise la France, ne serait pas approprié. La majorité a nettement rejeté l'emploi de l'équidistance. Toute solution autre que l'équidistance implique une enclave sous une forme ou une

autre. En fait, il y a lieu de relever que même l'équidistance entraînerait en l'espèce une "enclave", car la zone française, telle que délimitée par l'équidistance, serait entièrement à l'intérieur de la zone économique exclusive canadienne.

39. La solution de la majorité recourt à deux secteurs. La majorité a distingué un secteur à l'ouest de SPM et un secteur au sud de SPM. Dans le secteur occidental, la majorité a accordé à SPM 12 m.m. supplémentaires, à partir de la limite de sa mer territoriale, pour sa zone économique exclusive et sa zone contiguë. Dans le secteur méridional, la majorité a accordé à SPM une seconde zone maritime comprenant un corridor de 188 m.m. de long et de 10,5 m.m. de large.

40. On peut dire que l'une ou l'autre de ces deux solutions est défendable seule comme solution équitable de la présente délimitation. Mais il n'est pas bon de combiner les deux solutions étant donné que le fondement logique de l'une entre en conflit avec le fondement logique de l'autre ou le sape.

41. Le corridor méridional fixé par la majorité se fonde sur deux propositions. D'abord la proposition selon laquelle les côtes "se projettent frontalement, dans la direction à laquelle elles font face". Ensuite, la proposition selon laquelle "il ne faut pas laisser" la projection frontale de SPM en direction du sud "empiéter sur une projection frontale parallèle de segments adjacents du littoral sud de Terre-Neuve ou amputer leur projection". La majorité a déclaré que SPM est adjacent au littoral sud de Terre-Neuve. Comme SPM est adjacent au littoral sud de Terre-Neuve, la projection frontale de SPM doit se faire dans la même direction que la projection frontale du littoral de Terre-Neuve, c'est-à-dire vers le sud. Etant donné l'alignement latéral de Terre-Neuve et de SPM ainsi que l'adjacence de SPM au littoral de Terre-Neuve, un corridor de 200 milles s'étendant plein sud à partir de SPM semble constituer une solution justifiable puisqu'elle paraît répondre aux deux critères énoncés. Premièrement, le corridor permet une projection frontale ininterrompue de SPM sur 200 milles. Le corridor proposé par la majorité suppose donc que le littoral de l'île du Cap-Breton, qui se projette dans une large mesure frontalement vers l'est (et *non* pas simplement vers le sud, comme le Tribunal l'a déclaré), doit être ignoré et n'interfère pas avec le titre de SPM à ce corridor. En substance, le Tribunal accepte que ce qui compte, c'est uniquement les projections frontales, autrement dit vers le sud, des littoraux de Terre-Neuve et de SPM, et non les projections frontales du littoral du cap Breton. Deuxièmement, le recours au corridor limite la mesure dans laquelle la projection de SPM empiète sur les projections parallèles des sections adjacentes du littoral de Terre-Neuve vers l'est et vers l'ouest du corridor.

42. L'expansion du titre de SPM au-delà de la mer territoriale, dans le secteur occidental déterminé par la majorité, constitue tout spécialement la reconnaissance d'un droit de SPM à une projection vers l'ouest. Cette projection vers l'ouest contredit les deux propositions sur lesquelles repose la solution du corridor. D'abord, la projection de SPM

vers l'ouest contredit l'assertion selon laquelle ce sont les projections frontales des littoraux de Terre-Neuve et de SPM qui sont au centre de la présente délimitation. Le Tribunal a déclaré que SPM est adjacent au littoral de Terre-Neuve. En conséquence, la projection frontale de SPM est la même que celle du littoral adjacent de Terre-Neuve, orientées qu'elles sont vers le sud. L'extension vers l'ouest se fonde sur une projection vers l'ouest de SPM. Mais cette projection vers l'ouest n'est *pas* une projection frontale de SPM telle que le Tribunal l'a conçue. C'est pourquoi, en accordant une extension vers l'ouest à SPM, le Tribunal a accordé du poids à une projection non frontale et a contredit sa propre proposition selon laquelle il s'agit d'un rapport d'adjacence et qu'en conséquence ce sont les projections frontales qui sont au centre de la présente délimitation.

43. Ensuite, l'expansion vers l'ouest de SPM contredit la présomption du Tribunal suivant laquelle ce sont les littoraux de Terre-Neuve et de SPM qui comptent le plus pour la présente délimitation. Il n'est possible d'accorder à SPM un corridor d'orientation sud sur la largeur de son ouverture côtière méridionale (10,5 m.m.) qui s'étende au sud jusqu'à la limite du titre que la convention sur le droit de la mer reconnaît à SPM (188 m.m. à compter de sa mer territoriale) que si, comme je l'ai dit, aucun poids n'est accordé à la projection vers l'est du littoral du cap Breton. Pour accorder du poids à la projection vers l'ouest de SPM — bien que, ce faisant, il entrerait en conflit avec ses propres présomptions —, le Tribunal devrait logiquement reconnaître un effet correspondant à la projection vers l'est du littoral beaucoup plus long du cap Breton. La projection vers l'ouest de SPM est barrée par la projection vers le sud de Terre-Neuve ainsi que par la projection vers l'est de l'île du Cap-Breton, tandis que la projection vers l'est de l'île du Cap-Breton est barrée *seulement* par la projection vers le sud de SPM. Si le Tribunal veut accorder à SPM un titre fondé sur ses projections doublement barrées à l'ouest, il doit logiquement accorder autant de poids à la projection barrée *une fois* vers l'est du littoral du cap Breton, lequel se projette directement dans la zone qui comprend le corridor. Il faudrait alors accorder plus de poids à la projection du littoral du cap Breton qu'à la projection vers l'ouest de SPM. Accorder à la projection du littoral du cap Breton, lequel se projette directement dans le corridor, le poids qui serait logiquement nécessaire en cas de reconnaissance d'une quelconque projection vers l'ouest de SPM rendrait presque impossible une solution de corridor du genre de celle que la majorité a proposée.

44. La projection vers l'ouest accordée à SPM contredit aussi la seconde présomption sur laquelle repose la solution du corridor, à savoir qu'"il ne faut pas laisser" la projection frontale de SPM, en direction du sud "empiéter sur une projection frontale parallèle de segments adjacents du littoral sud de Terre-Neuve ou amputer leur projection". L'expansion du titre maritime de SPM vers l'ouest empiète directement sur la projection frontale du littoral sud de Terre-Neuve. La majorité déclare à juste titre qu'une certaine amputation est peut-être inhérente

à toute délimitation, mais l'amputation ou l'empiétement que cause l'extension vers l'ouest est inacceptable parce que l'une des deux raisons pour lesquelles le Tribunal a adopté la solution du corridor était d'empêcher que ne se produise un empiétement de ce type, précisément. Le but, qui était d'éviter un empiétement et qui a conduit à la solution du corridor, est manqué si l'on ajoute une zone occidentale laquelle empiète sensiblement sur les projections du littoral de Terre-Neuve.

45. En cas de solution comportant un corridor, la logique et l'équité voudraient cependant que le Tribunal accorde un certain poids à la projection frontale du littoral du cap Breton vers l'est. Dès lors, si la solution du corridor constituait la seule solution, il faudrait tenir compte du littoral du cap Breton en adoptant ce corridor et en réduisant la superficie totale de moitié au moins. Cela entraînerait un rétrécissement du corridor, dont la largeur serait ramenée à 5,25 m.m. et, partant, la reconnaissance au Canada d'un titre sur la zone du corridor, au moins égal à celui de SPM. Cela conduirait à un corridor de 188 m.m. sur 5,25 m.m. pour une superficie totale de 987 milles marins carrés.

46. Reconnaître la projection vers l'est du littoral du cap Breton n'obligerait pas à donner du poids à la projection vers l'ouest de SPM. La projection frontale du littoral du cap Breton se fait, dans une large mesure, vers l'est, tandis que la projection de SPM vers l'ouest n'est pas une projection frontale du littoral de SPM, en raison de son adjacence au littoral sud de Terre-Neuve. De plus, comme je l'ai déclaré ci-dessus, la projection de SPM vers l'ouest est doublement barrée par la projection vers le sud du littoral de Terre-Neuve et par la projection vers l'est du littoral du cap Breton, tandis que la projection vers l'est de l'île du Cap-Breton n'est barrée qu'une seule fois par les projections vers le sud de SPM (comme l'est le corridor de SPM vers le sud par la projection du cap Breton). Etant donné que la projection vers l'ouest de SPM est doublement barrée, il n'est pas nécessaire, pour donner du poids à la projection vers l'île du Cap-Breton en réduisant le corridor, de donner un poids quelconque à la projection vers l'ouest de SPM.

47. Si l'on rejette une solution comportant un corridor, une solution qui peut se justifier consiste en une petite enclave agrandie, qui s'étende à quelques milles au-delà de la mer territoriale de SPM, SPM se voyant accorder une zone, au-delà de la mer territoriale, d'environ 600 milles marins carrés, c'est-à-dire de la superficie approximative de l'extension vers l'ouest accordée par le Tribunal. Une petite enclave agrandie de cette superficie environ, sans rien d'autre (sans un corridor) pourrait se justifier comme suit : premièrement, elle ne serait plus incompatible avec le fondement logique d'une bonne partie de la décision; deuxièmement, elle n'accorderait pas à SPM une zone excessive; troisièmement, une enclave agrandie traduirait dans les faits les circonstances géographiques de l'espèce. En conséquence, une telle enclave ne semblerait pas inéquitable.

48. En conclusion, l'une ou l'autre des deux méthodes employées dans la sentence — une enclave agrandie ayant environ la superficie que

la majorité a utilisée ou un corridor réduit — peut se justifier comme méthode de délimitation équitable, à condition d'être employée seule. (Un corridor, de par sa forme, peut soulever des questions administratives, mais il découle du principe de la liberté de la navigation dans la zone économique exclusive de chaque pays — principe garanti par le droit international et fermement défendu par les deux Parties — que les navires canadiens et français jouiront du droit de libre passage dans la zone économique exclusive de l'un et l'autre Etat.) Mais il n'est pas bon de combiner ces deux méthodes de délimitation, comme la majorité l'a fait, car les présomptions qui rendent une méthode équitable sont alors contredites ou niées par l'emploi de l'autre méthode. Combiner ces deux méthodes signifie que la délimitation n'est pas effectuée conformément à des principes équitables.

II. *Le Tribunal n'a pas abouti à un résultat équitable*

49. Comme la majorité le déclare à juste titre, pour déterminer si le résultat d'une délimitation maritime est équitable, il est nécessaire de comparer le rapport entre chacune des zones totales attribuées aux Parties et le rapport entre les longueurs des côtes pertinentes. A mon avis, le rapport exact entre les côtes pertinentes de SPM et les côtes pertinentes du Canada est de 21,4 à 1. La plus grande zone pertinente qu'on peut prétendre utiliser pour vérifier la proportionnalité si l'on emploie la solution du corridor est, comme je l'ai expliqué ci-dessus, de 48 791,5 milles marins carrés.

50. La zone accordée à Saint-Pierre-et-Miquelon le long de sa mer territoriale de 12 milles a une superficie de 1 070 milles marins carrés. Le corridor de 188 m.m. de long et de 10,5 m.m. de large constitue une zone supplémentaire de 1 974 milles marins carrés. La zone totale attribuée à SPM par la sentence a donc une superficie de 3 617 milles marins carrés, ce qui laisse au Canada une part de la zone pertinente qui totalise 45 174,5 milles marins carrés. Le rapport entre la zone du Canada et la zone de SPM est de 12,5 à 1.

51. La délimitation a pour résultat d'attribuer des espaces maritimes dans un rapport de 12,5 à 1 alors que les longueurs de côtes des deux Etats en présence sont dans un rapport de 21,4 à 1, si l'on utilise la zone pertinente que j'ai définie. Ce rapport de 12,5 à 1 montre qu'on accorde à SPM une zone trop grande. En outre, comme la zone pertinente étendue semble quelque peu artificielle et trop vaste et qu'elle exagère par conséquent la zone laissée au Canada par la sentence, il semble que le rapport exact entre les zones serait encore plus favorable à la France que ce rapport de 12,5 à 1. Il est incontestable qu'une disproportionnalité aussi flagrante, qui accorde à SPM une zone environ deux fois plus grande que le laisserait penser la longueur de son littoral, signifie que le résultat de la délimitation n'est pas équitable. En conséquence, le résultat de cette délimitation n'est pas conforme au droit international.

52. La majorité du Tribunal, en déterminant une plus grande zone pertinente, de 63 051 milles marins carrés, a obtenu un rapport entre les zones de 16,4 à 1. Le Tribunal a ensuite comparé ce rapport avec le rapport entre les côtes, à savoir 15,3 à 1, et il a déclaré que le résultat était équitable. La difficulté tient au fait que la zone pertinente de 63 051 milles marins carrés est une zone pertinente artificiellement grossie. De même, le rapport entre les côtes, à savoir 15,3 à 1, a été obtenu par la majorité après qu'elle eut, d'une manière inappropriée, diminué la longueur du littoral pertinent du Canada et augmenté la longueur du littoral du SPM. C'est pourquoi les rapports utilisés par le Tribunal ne démontrent pas que la sentence est équitable.

53. Si le Tribunal n'avait accordé à SPM qu'un corridor de 188 m.m. sur 5,25 m.m., qui se serait évidemment ajouté à sa mer territoriale de 12 m.m., SPM aurait eu droit au total à 2 057 milles marins carrés (une mer territoriale de 1 070 milles marins carrés plus un corridor de 987 milles marins carrés). Si l'on avait utilisé une zone pertinente de 48 791,5 milles marins carrés pour la solution ainsi proposée, le Canada aurait reçu 46 734,5 milles marins carrés. Le rapport entre la zone attribuée au Canada et la zone attribuée à SPM aurait été de 22,7 à 1. C'est pourquoi la solution du corridor, si elle était correctement appliquée, accorderait à SPM une zone légèrement inférieure (de 6%) à son titre proportionnel. Là encore, le fait que la zone pertinente élargie est trop vaste signifie que le rapport exact est probablement un peu plus favorable à la France. Si la méthode du corridor réduit peut être défendue en tant que méthode de délimitation équitable et si elle était utilisée seule, et non pas concurremment avec la zone occidentale élargie, qui est contradictoire et incompatible, on pourrait considérer que le résultat est équitable. De même, une enclave agrandie, d'une superficie semblable à celle recommandée par la majorité, pourrait aussi être considérée comme équitable, isolément. Certes, si l'on se sert de la zone pertinente des approches du golfe pour vérifier la proportionnalité du résultat, le rapport entre la zone attribuée à la France et la zone laissée au Canada semble plutôt favorable à la France. Toutefois, en utilisant la zone pertinente restreinte des approches du golfe, le rapport entre les zones risque de sous-estimer considérablement la zone laissée au Canada par une solution d'enclave agrandie, et cela pour les raisons que j'ai exposées ci-dessus lorsque j'ai examiné les zones pertinentes. En conséquence, l'enclave agrandie, en tant que solution unique, ne semblerait pas inéquitable. Mais la combinaison du corridor et de la zone occidentale étendue est une méthode inéquitable qui accorde à SPM une zone disproportionnellement grande et aboutit par conséquent à un résultat inéquitable.

III. *Questions secondaires*

A. *Comparaison du statut politique de SPM et de celui du Canada*

54. Il est dit, dans la sentence, que la distinction faite dans l'affaire *anglo-française* entre Etats dépendants et indépendants "n'a pas cours dans la présente affaire puisque toutes les îles en cause dans la

procédure doivent être considérées comme des îles de la France ou du Canada, respectivement, et qu'aucune d'elles n'est un Etat indépendant ou semi-indépendant". Il est également déclaré dans la sentence :

> Sans comparer, et moins encore mettre sur le même pied, l'importance économique ou politique des territoires en présence en l'espèce, il faut conclure, d'un point de vue strictement juridique, que Terre-Neuve, bien que d'une superficie beaucoup plus grande que Saint-Pierre-et-Miquelon, est également une île qui n'a pas le statut d'Etat politiquement indépendant ou semi-indépendant.

55. Mettre ainsi sur le même pied les territoires du Canada et de SPM est très trompeur, me semble-t-il. Il existe une importante différence politique entre une île qui est un territoire d'outre-mer dépendant et une île qui fait partie intégrante d'un Etat fédéral continental et qui se trouve à proximité immédiate de la masse terrestre de cet Etat.

56. La distinction faite dans l'affaire *anglo-française* semble directement applicable en la présente espèce. Le raisonnement du tribunal montre que le statut politique diminué des îles Anglo-Normandes a constitué un facteur pertinent dans la décision d'enclaver ces îles. Comme le statut politique de SPM peut être comparé à celui des îles Anglo-Normandes (bien que SPM soit moins peuplé et moins autonome) et comme Terre-Neuve et la Nouvelle-Ecosse, en tant que parties intégrantes de la masse terrestre adjacente de l'Etat canadien, sont entièrement comparables à des parties de l'Etat français adjacent dans l'affaire *anglo-française*, il faut en conclure que moins de poids devrait être accordé au littoral de SPM. Il me semble qu'ignorer le raisonnement du tribunal qui a connu de l'affaire *anglo-française* reviendrait à s'écarter de la jurisprudence et des normes actuelles de la délimitation maritime.

57. En outre, je ne peux me ranger à l'avis de la majorité du Tribunal, selon lequel l'arbitrage *anglo-français* est sans intérêt pour le présent différend. Certes, SPM n'est pas situé entre deux côtes opposées de masses terrestres, en ce sens que la France n'est pas opposée à Terre-Neuve, mais il semble que l'absence d'une côte française sur une masse terrestre ne rend pas l'arbitrage *anglo-français* inapplicable. Le raisonnement qui a justifié une enclave autour des îles Anglo-Normandes dans cette affaire-là paraît être tout autant pertinent en la présente affaire. L'absence d'une côte française sur une masse terrestre ne devrait pas augmenter le titre de SPM mais plutôt le diminuer.

58. La majorité du Tribunal a déclaré, au paragraphe 50, que l'arrêt rendu par la Cour internationale de Justice dans l'affaire *Libye/Malte* donne à penser, à son paragraphe 72, "à une égalité de traitement plutôt qu'à un traitement amoindri pour les îles politiquement dépendantes". Qu'il me soit permis de dire que ce que l'affaire *Libye/Malte* donne à penser, c'est que la manière de traiter les îles dépendra de leur statut politique. Dans cette affaire, la Cour a déclaré, au paragraphe 53 :

> En d'autres termes, les limites maritimes pourraient fort bien se présenter différemment dans la région si les îles maltaises, au lieu de constituer un Etat indépendant, faisaient partie du territoire de l'un des pays voisins.

La Cour a ajouté que "Malte ... ne saurait être, à cause de son indépendance, dans une situation moins favorable en ce qui concerne les droits sur le plateau continental" (par. 72). La Cour internationale de Justice semble dire, dans ces deux passages, qu'un Etat insulaire indépendant mérite un titre maritime plus étendu qu'une île dépendante qui fait partie du territoire d'un autre Etat. En d'autres termes, une île dépendante faisant partie d'un autre Etat aurait droit à une zone maritime réduite.

59. Comme je l'ai dit ci-dessus, le statut politique des îles de Terre-Neuve et du Cap-Breton n'est aucunement semblable à celui de SPM. En outre, les îles du Cap-Breton et de Terre-Neuve sont situées à proximité immédiate de la masse terrestre continentale du Canada tandis que SPM est située à une grande distance de la masse terrestre de l'Etat français. Si l'on applique le raisonnement tenu dans l'affaire *Libye/Malte*, il semble que SPM a droit à une zone maritime plus petite que celle à laquelle il aurait droit s'il était un Etat insulaire indépendant.

B. *Les traités anciens*

60. Comme le statut politique de SPM et celui du Canada présentent, à mon avis, de l'intérêt pour la délimitation, j'estime aussi que les anciens traités en présentent, car ils mettent en lumière le statut politique de SPM. Si les anciens traités entre la France et la Grande-Bretagne ne suffisent pas à fournir au Tribunal la réponse à la question de la délimitation équitable à effectuer en l'espèce, ils donnent à penser que la France et la Grande-Bretagne envisageaient que Saint-Pierre-et-Miquelon aurait un statut quelque peu restreint. Il est bien évident qu'en 1783 la France et la Grande-Bretagne n'envisageaient pas le régime actuel du droit de la mer contemporain, mais le fait qu'ils envisageaient une certaine forme de statut restreint pour Saint-Pierre-et-Miquelon peut être quand même intéressant lorsqu'on détermine le titre maritime de Saint-Pierre-et-Miquelon en vertu du droit de la mer actuel. En d'autres termes, les traités anciens paraissent ajouter du poids à la différence entre les statuts politiques respectifs de SPM et du Canada. Il convient de relever que l'accord instituant le Tribunal d'arbitrage rend applicables les accords internationaux conclus entre les Parties.

C. *La zone contiguë*

61. La majorité du Tribunal a déclaré que le titre de SPM à une extension vers l'ouest au-delà de sa mer territoriale de 12 m.m. constituait une solution raisonnable et équitable. La majorité a déclaré que la zone serait de l'étendue de la zone contiguë visée à l'article 33 de la convention sur le droit de la mer. En choisissant un chiffre de 12 m.m. pour l'étendue de l'extension vers l'ouest et en se référant expressément pour ce faire à la zone contiguë, le Tribunal semble sous-entendre que l'article 33 de la convention de 1982 confère à tous les Etats côtiers une sorte de titre à une zone contiguë de 12 milles. Avec l'apparition de la zone économique exclusive, il n'y a plus eu de titre indépendant à une zone contiguë. Dans l'arbitrage *anglo-français*, on n'a accordé aux îles

Anglo-Normandes, au-delà de leur mer territoriale de 12 m.m., aucune zone correspondant à un "titre" à une zone contiguë. C'est pourquoi, même si une extension vers l'ouest du titre de SPM se justifie en équité, l'étendue de la zone contiguë selon la convention de 1982 sur le droit de la mer ne fournit aucune indication quant à l'étendue du titre de SPM vers l'ouest.

D. *Le plateau continental élargi*

62. Dans ses écritures, la France soutient que les lignes de délimitation que le Tribunal doit tracer, conformément à l'équidistance, devraient être étendues au-delà de 200 milles et atteindre la limite de 200 milles du Canada, de manière à donner à SPM un accès au plateau continental au-delà de la limite de 200 milles. La France fait valoir qu'il faudrait procéder à la délimitation en traçant *deux* lignes qui ne se rejoignent pas avant d'atteindre la limite de la zone économique exclusive du Canada. Elle allègue que, si le Tribunal n'étendait pas les lignes de délimitation, il nierait à la France le droit qu'elle a à un large plateau continental s'étendant jusqu'au rebord externe de la marge continentale.

63. C'est à juste titre que le Tribunal a refusé d'étendre les lignes de délimitation jusqu'à la limite de la zone canadienne de 200 milles et qu'il a refermé les lignes tracées à partir des points 1 et 9 de l'accord de délimitation de 1972. La sentence attribue à SPM une zone qui est entièrement contenue dans la zone économique exclusive de 200 milles du Canada. Autrement dit, la zone de la France est totalement "enclavée dans une zone". La question de la revendication par la France d'un plateau continental au-delà de sa limite de 200 milles ne peut donc pas se poser. La zone économique exclusive du Canada, qui entoure la zone de la France, lui confère des droits complets sur les fonds marins, ainsi que le droit international et la convention de 1982 sur le droit de la mer le prévoient avec clarté. Dans ces conditions, toute revendication de la France devrait — miraculeusement — traverser la zone canadienne de 200 milles sur une distance d'environ 100 milles — dans une espèce de demi-sommeil — puis elle devrait en quelque sorte se réveiller pour prétendre au plateau continental physique au-delà de la zone canadienne de 200 milles, à un distance d'environ 300 milles au sud de SPM.

64. Comme le Tribunal a refermé les lignes de délimitation avant qu'elles atteignent la limite de la zone économique exclusive du Canada, il aurait dû rejeter carrément toute revendication par la France d'un plateau continental au-delà de la limite canadienne de 200 milles. Or le Tribunal, au lieu de rejeter une revendication française impossible, a déclaré qu'il n'était pas compétent pour se prononcer sur la question. Il a ajouté que la question du droit de SPM à un plateau continental étendu relèverait de l'Autorité des fonds marins, au moment où elle pourrait prendre naissance. Qu'il me soit permis de dire qu'il n'existe aucun fondement sur lequel SPM, dont la zone maritime est totalement enclavée dans une autre zone, pourrait s'appuyer pour revendiquer des droits à un plateau continental au-delà de sa zone, même si l'Autorité des fonds marins existait.

E. *Questions supplémentaires*

65. J'ai esquissé les principales réserves que m'inspire la sentence, mais il y a encore dans celle-ci nombre de points auxquels je ne peux pas souscrire. Sans les exposer tous, je mentionnerai premièrement que je ne peux pas partager l'avis de la majorité du Tribunal quand elle déclare que le relevé des conclusions ne contient pas de propositions concrètes et qu'il est sans intérêt pour la présente délimitation. Dans l'annexe à ce document, il est indiqué que la largeur de l'enclave proposée est de 12 m.m., et, selon la sentence rendue dans l'affaire arbitrale *anglo-française*, le tribunal arbitral qui a connu de cette affaire a été informé que "la République française et le Canada [étaient] convenus d'une délimitation qui n'accorde rien de plus qu'une zone de 12 milles de mer territoriale à Saint-Pierre-et-Miquelon" (par. 200). Deuxièmement, la situation hypothétique examinée par le Tribunal au paragraphe 73, passage dans lequel le Tribunal imagine quel serait l'effet du littoral du cap Breton si Terre-Neuve n'existait pas, ne permet aucunement de conclure que les projections à partir du littoral du cap Breton sont sans incidence sur le titre de SPM à la zone méridionale en forme de corridor. En réalité, les projections de 200 m.m. à partir des côtes de Terre-Neuve et du cap Breton se projettent toutes deux dans la zone méridionale en forme de corridor. Le fait que SPM pourrait notamment avoir droit à ce corridor si la délimitation n'intervenait qu'entre le cap Breton et SPM est sans aucun rapport avec la réalité géographique de la région.

IV. *Conclusion*

66. En conclusion, je suis d'avis que la sentence ne recourt pas à des méthodes équitables pour procéder à la délimitation. Elle n'aboutit pas à un résultat équitable. C'est pourquoi je ne peux pas souscrire à cette sentence.

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Fourth entry, third line, replace the date "30 March 1992" with "30 March 1989".

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